

1-15-1997

## Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California

Glenn S. Koppel

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### Recommended Citation

Glenn S. Koppel *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 Pepp. L. Rev. 2 (1997)  
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# Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California

Glenn S. Koppel\*

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Grateful acknowledgement is extended to Neil Gotanda, Susan Keller and Michael Schwartz—my colleagues on the faculty of WSU—each of whom provided careful readings of, and extremely valuable comments on, prior drafts. I also wish to thank Elizabeth Nadelson, Laura Sitar and, especially Nikki Erlandson—all members of the Western State University Law Review—for their assistance in editing this Article's voluminous footnotes.

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## INTRODUCTION

The law of summary judgment as applied in California state courts has degenerated into a state of confusion. This confusion stems from a poorly drafted summary judgment statute compounded by a flawed 1995 decision of the Second Appellate District California Court of Appeal in *Union Bank v. Los Angeles County Superior Court*.<sup>1</sup> In *Union Bank*, the court held that the California Legislature intended a substantial expansion of summary judgment.<sup>2</sup> The court based the holding on its interpretation of a concededly ambiguous statute and upon contradictory legislative history.<sup>3</sup>

To clarify the problematic summary judgment statute, the state's Republican governor,<sup>4</sup> with support from Republican legislators, the defense bar, and business interests, proposed yet another poorly drafted amendment—Assembly Bill 3113.<sup>5</sup> However, the bill died in the Democrat-controlled Senate Judiciary Committee on August 7, 1996.<sup>6</sup> Apart from the bill's merits, this flawed proposal never had a chance for passage by the Senate because of opposition by the powerful trial lawyers' lobby.<sup>7</sup> As a result of this political stalemate on a point of civil procedure, the confusion regarding the state of summary judgment in California is likely to continue at least as long as control of the legislature is split between opposing political forces.<sup>8</sup>

1. 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

2. *Id.* at 663.

3. Prior to *Union Bank*, the statute's own sponsor vigorously denied the intent that subsequently was attributed to the statute by *Union Bank*. See CALIFORNIA LEGISLATURE, ASSEMBLY DAILY JOURNAL, REPORT TO THE GEN. ASSEMBLY OF 1993-94, at 4190 (1993).

4. There are numerous references throughout this Article to Republicans and Democrats. This Article does not intend by these references to single out for judgment any political party. This Article's examination of the recent politicization of civil procedure will explore the role of political parties in shaping procedural rules, especially summary judgment. Summary judgment is a partisan issue in California, and the political story cannot be told without referring to the players.

5. A.B. 3113, 1995-1996 Reg. Sess. (Cal. 1996). Assembly Member Goldsmith introduced Assembly Bill 3113 on February 23, 1996; it passed the Republican Assembly on May 28 of that year. A.B. 3113, Votes—Roll Call on Assembly Floor (on file with author).

6. A.B. 3113, Votes—Roll Call in Senate Committee on Judiciary (on file with author).

7. See JAN GOLDSMITH & PETE WILSON, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 3113, Reg. Sess. 5-6 (1996) (noting opposition by Consumer Attorneys of California).

8. The Democrats regained control of the Assembly by a "paper thin" majority in

The confusion over summary judgment primarily involves the movant's burden standard. Summary judgment law requires the moving party to show that no triable issue exists as to any material fact, thereby making a trial unnecessary.<sup>9</sup> When a defendant moves for summary judgment seeking dismissal of a claim, it must show that there is no genuine issue as to at least one of the essential elements of the claim.<sup>10</sup> Under current California summary judgment law, however, it is unclear whether the moving defendant must conclusively negate that element with its own affirmative proof, which is the traditional rule,<sup>11</sup> or whether the defendant need only demonstrate insufficiency of the plaintiff's evidence, which is the current federal standard.<sup>12</sup> California courts appearing to apply the latter standard have yet to establish whether the moving defendant need only "point out" to the court the gaps in the plaintiff's evidence, or whether the defendant must affirmatively demonstrate, through discovery, that the plaintiff has no case.<sup>13</sup>

This Article argues that California's troubled summary judgment experience is but a symptom of a larger problem—the very process by which California promulgates rules of civil procedure. Fundamentally, the California Constitution gives the rulemaking initiative to the legislature and the people, leaving the state's Judicial Council with residual, or secondary, authority to adopt rules "when and where the higher authority of the Legislature and the people has not been exercised."<sup>14</sup> This Article demonstrates how this rulemaking process, referred to herein as "legislative primacy," does not work because it produces ineffective summary judgment law.

Seventy years after its creation, the Judicial Council has largely fulfilled its early promise among judicial reformers except in one crucial area, the rulemaking power. Today, the Judicial Council has fully devel-

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the November 1996 elections. Mark Gladstone & Carl Ingram, *Democrats Recapture Control of Assembly*, L.A. TIMES, Nov. 7, 1996, at A1.

9. CAL. CIV. PROC. CODE § 437c (West Supp. 1996). All statutory references in this Article are to the California Code of Civil Procedure unless otherwise indicated.

10. § 437c(f)(1).

11. See *Barnes v. Blue Haven Pools*, 81 Cal. Rptr. 444, 447 (Ct. App. 1969).

12. See generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that moving party only needs to show "absence of evidence").

13. See *Hagen v. Hickenbottom*, 48 Cal. Rptr. 2d 197, 207 (Ct. App. 1995) (holding that defendant must make an "affirmative showing"). But see *Hunter v. Pacific Mechanical Corp.*, 44 Cal. Rptr. 2d 335, 338 (Ct. App. 1995) (holding that defendant could point to an "absence of evidence").

14. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 7 n.36 (1958) (quoting *Lane v. Superior Court*, 285 P. 860, 862 (Cal. Ct. App. 1930); see CAL. CONST. of 1879, art. VI, § 6 (1966). In fact, California procedure remains almost entirely governed by code. See INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS 4 (1955).

oped its rulemaking expertise and has the staff support structure to give it necessary rulemaking capability.<sup>15</sup> Nevertheless, while the legislature has delegated pieces of rulemaking authority to the Judicial Council, it has yet to transfer complete rulemaking power.<sup>16</sup> California is one of the few remaining American jurisdictions where the legislature continues to write the rules of court procedure.<sup>17</sup> The current politicization of procedure makes it even more timely for California to rethink the wisdom that placed rulemaking power in legislative hands, and to reconsider a long-standing proposition that the Judicial Council be given complete procedural rulemaking authority.

This critique of California's legislative rulemaking process divides into four parts. Part I briefly describes the constitutional and historical bases for legislative primacy in California's procedural rulemaking.<sup>18</sup> This Part attributes California's continued adherence to the legislative primacy model to historical accident stemming from California's entrenched "code" tradition. It also examines the quasi-successful State Bar and Judicial Council efforts to transfer the complete rulemaking

15. See CAL. R. CT. 1000-1040.

16. CAL. CONST. art. VI, § 6; California Court Reporters Ass'n v. Judicial Council, 46 Cal. Rptr. 2d 44, 48-49 (Ct. App. 1995).

17. DAVID B. ROTTMAN ET AL., STATE COURT ORGANIZATION 1993, 117 (1995). This book lists California as the only remaining state whose legislature formulates procedural rules. *Id.* However, Article 6, section 30 of the New York State Constitution allows the legislature to delegate to the courts, "in whole or in part," the power to promulgate procedural rules. N.Y. CONST. of 1894, art. 6, § 30 (1961, amended 1977). *New York State's Civil Practice Law and Rules* is partly procedural statute enacted by the New York State Legislature and partly judicially promulgated rules of court. As in California, the New York State Legislature has delegated rulemaking power to the judiciary in specific areas only. *Id.*

A 1982 survey of the 50 states in categories of state court reform ranks California a distant 47th in the category of "Judicial Rulemaking." The honor of last place is reserved for New York, the home of the Field Code. See Henry R. Glick, *Supreme Courts in State Judicial Administration*, in STATE SUPREME COURTS—POLICYMAKERS IN THE FEDERAL SYSTEM, 109, 122-23 (Mary Cornelia Porter & G. Alan Tarr eds., 1982) (Table 5.1: *The Fifty States Ranked in Categories of State Court Reform*); see also Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 163 (1991) (stating that "[m]ost states have not only copied many or all of the [Federal Rules of Civil Procedure], but have adopted judicial rulemaking if they had not previously done so").

18. See *infra* notes 27-79 and accompanying text.



power from the legislature to the Judicial Council.<sup>19</sup> As a result of these efforts, the Council is now capable of overhauling California's Code of Civil Procedure.<sup>20</sup>

Part II examines the politicization of the rulemaking procedure over the last twenty years and reveals how this phenomenon has plagued the federal rulemaking process as powerful interest groups have successfully lobbied Congress to alter the federal rules for strategic advantage.<sup>21</sup> This part also argues that continued legislative rulemaking in the current politically charged procedural environment threatens to continue to adversely affect California civil procedure rules in the same manner.<sup>22</sup>

Part III analyzes the deteriorating state of summary judgment law in California and lays blame at the doorstep of the legislative primacy model of rulemaking.<sup>23</sup>

Part IV considers the wide implications of the legislature's failure to develop sound summary judgment law for California's legislative primacy model.<sup>24</sup> This section determines that the existing process fails both because legislators lack sufficient understanding of procedural issues and because they are directly pressured by organized interest groups who seek to tilt what should be the level playing field of procedural rules to their advantage.<sup>25</sup>

The Article concludes that it is time for the California Legislature to release its rulemaking power to the Judicial Council, and to retain only a veto power.<sup>26</sup>

## I. CALIFORNIA'S LEGISLATIVE PRIMACY RULEMAKING PROCESS

### A. *A Description of California's Legislative Primacy Rulemaking Process*

In California, the legislature and the people have the primary authority to prescribe the civil procedural rules for state courts. Therefore, the Judicial Council's rulemaking authority is secondary to that of the legislature.<sup>27</sup> As a result of this unique allocation of rulemaking authority, the legislature enacted the California Code of Civil Proce-

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19. See *infra* notes 57-73 and accompanying text.

20. See *infra* notes 69-70 and accompanying text.

21. See *infra* notes 80-185 and accompanying text.

22. See *infra* notes 166-85 and accompanying text.

23. See *infra* notes 186-506 and accompanying text.

24. See *infra* notes 507-59 and accompanying text.

25. See *infra* notes 511-16 and accompanying text.

26. See *infra* notes 560-61 and accompanying text.

27. Throughout this Article, this allocation of rulemaking authority will be referred to as the legislative primacy model of rulemaking process.

ture.<sup>28</sup> In stark contrast, the judiciary promulgates the procedural rules of most other state courts and all federal district courts; in fact, among the state judicial systems, California is one of the few remaining states where the grant of procedural rulemaking authority rests with the legislature.<sup>29</sup>

California case law confirms the dominance of the legislature and the people in the rulemaking process. Based upon its interpretation of article VI, section 6, and article II, section 8 of the California Constitution (relating to the "initiative" power of the people), the California Supreme Court has held that the legislature and the people are the primary initiators and promulgators of civil procedural rules in state courts.<sup>30</sup> Most recently, in the 1985 decision *In re Lance W.*,<sup>31</sup> the court held:

The Legislature and, a fortiori, the people acting through either the reserved power of statutory initiative or the power to initiate and adopt constitutional amendments (art. II, § 8) may prescribe rules of procedure and of evidence to be followed in the courts of this state. . . . That the authority of the judicial branch of government is subject to legislative enactment of rules of procedure is implicit in article VI, section 6 of the California Constitution which empowers the Judicial Council to "adopt rules for court administration, practice and procedure, not inconsistent with statute."<sup>32</sup>

Under California's constitution, the Judicial Council has only a supplemental rulemaking authority.<sup>33</sup> In the hierarchy of procedural rules, the

28. See CAL. CIV. PROC. CODE §§ 1, 2 (West 1982 & Supp. 1996).

29. See *supra* note 17.

30. See, e.g., *Solberg v. Superior Court*, 561 P.2d 1148, 1154 (Cal. 1977) (citing *Sacramento & San Joaquin Drainage Dist. v. Superior Court*, 238 P. 687, 694 (Cal. 1925)).

31. 694 P.2d 744 (Cal. 1985).

32. *Id.* at 755-56 (quoting CAL. CONST. art. VI, § 6); see also Levin & Amsterdam, *supra* note 14, at 7 n.36 ("[I]n California . . . the full and absolute authority over procedure remains in the legislature; and what is constitutionally granted to the courts proves merely a patchwork power which . . . is in the final analysis no power at all.").

33. See CAL. CONST. art. VI, § 6. Article VI, section 6 also confers upon the Judicial Council the role of managing the business of the courts. In order "to expedite judicial business and to equalize the work of judges," the constitution empowers the Chief Justice to assign judges to assist courts other than their own which suffer from congested dockets, and to direct judges to report to the Judicial Council "concerning the condition of judicial business in their courts." *Id.*

The Council has been a very effective agent of judicial reform in its administrative role. See Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990*, 66 S. CAL. L. REV. 2049, 2081 (1993) ("[Chief Justice Gibson] gave new impetus to the development of the Judicial Council as an effective administrative instrument . . . . All of the chief justices since

legislature's statutory rules supersede the Judicial Council's supplemental rules of court.<sup>34</sup> In essence, it is this hierarchy that makes the legislature's rulemaking power dominant over that of the Judicial Council.<sup>35</sup> By contrast, the Federal Rules of Civil Procedure promulgated by the United States Supreme Court supersede inconsistent congressional statutes.<sup>36</sup>

*B. California's Legislative Primacy Process is an Historical Accident:  
A Case of Imprinting at Birth*

The longevity of California's legislative primacy model of rulemaking is largely the result of an accident of history.<sup>37</sup> Essentially, California has never known any other rulemaking regime.<sup>38</sup> Unlike the judiciaries in

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1940 have given a high priority to their duties as administrative leader of the courts."). The same 1982 survey that ranks California as 47th among the 50 states in the "Judicial Rulemaking" category ranks California third in "Judicial Education and Qualifications," eighth in "Court Consolidation and Simplification," and 26th in "Centralized Judicial Management." See Glick, *supra* note 17, at 122-23.

34. Preble Stolz & Kathleen Gunn, *The California Judicial Council: The Beginnings of an Institutional History*, 11 PAC. L.J. 877, 881-82 (1980).

In 1995, the California Court Reporters Association succeeded in persuading the First District Court of Appeal to invalidate a Judicial Council rule of court as "inconsistent with statute." California Court Reporters Ass'n v. Judicial Council, 46 Cal. Rptr. 2d 44, 46 (Ct. App. 1995). The rule of court would have authorized the electronic recording of superior court proceedings as the official record of those proceedings. *Id.* at 45. The court reporters had previously succeeded in using their political clout in the legislature to block the enactment of the same rule. *Id.* In a resounding affirmation of the legislature's dominant rulemaking authority, the court rejected the Judicial Council's argument that, "as it and the Legislature both derive their powers from the state Constitution, the two institutions are coequals." *Id.* at 49. The court held that "[t]he Constitution reserves to the Legislature and the people of this state the higher right to provide rules of procedure." *Id.* The court emphasized that "[t]he Judicial Council's right is secondary—a right to adopt rules only when the higher authority of the Legislature and the people has not been exercised." *Id.* at 47.

35. Stolz & Gunn, *supra* note 34, at 881-82. In specific areas, the legislature has delegated to the council the power to promulgate procedural rules that supersede inconsistent statutes, and thereby have the binding force of procedural statutes. *Id.* at 882. These areas are "appellate practice, pretrial conferences, family law procedure, and juvenile court practice." *Id.*

36. See 28 U.S.C. § 2072 (1994); Stolz & Gunn, *supra* note 34, at 882.

37. Another factor that explains the legislature's refusal to release its rulemaking power to the judiciary is the politically charged environment that has surrounded procedural rules since the 1980s. As discussed in Part II, special interest groups have been using their influence in the legislature to alter procedural rules to advance substantive goals. See *infra* notes 80-185 and accompanying text. These interest groups may well perceive that they would stand to lose their influence over procedure if the legislature, the forum most directly responsive to lobbying, were to surrender completely the rulemaking power. See *infra* notes 80-185 and accompanying text.

38. See *infra* notes 80-185 and accompanying text.

many other states, California courts never possessed the complete rulemaking power.<sup>39</sup> Thus, California has no previous tradition of judicial rulemaking to which it can return.<sup>40</sup>

Part of the explanation for the tight grip that legislative primacy has on the rulemaking process in California is that California was imprinted at birth with the Field Code and remains today one of the quintessential code states.<sup>41</sup> California's code tradition, which has been deeply entrenched in this state since California joined the Union in 1850, firmly roots legislative supremacy in procedural rulemaking.<sup>42</sup>

The code movement to reform the labyrinth of antiquated common law procedural rules began in New York with the enactment of the Field Code by New York's legislature in 1848.<sup>43</sup> The common law procedure, drawn from English case law, had become a scandal.<sup>44</sup> Because the

39. See *infra* notes 80-185 and accompanying text.

40. See Ralph N. Kleps, *Efforts to Govern Court Procedure by Rule Make Progress in California*, 17 CAL. ST. B.J. 18, 20 (1942) (providing an overview of civil procedure in California courts).

41. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1383 (1986). "California adopted code pleading in 1851. The Practice Act of that year was based on the code which David Dudley Field had prepared for New York three years before; Field's brother, Stephen J. Field later a Justice of the United States Supreme Court, came to California in 1850 and was the author and prime mover of the California legislation. The 1851 Practice Act was succeeded, in 1872, by a Code of Civil Procedure which, much amended remains in effect today." Charles Alan Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 91 (1959).

42. Oakley & Coon, *supra* note 41, at 1383.

43. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, *CIVIL PROCEDURE* § 1.6, at 18 (3d ed. 1985). The Field Code "sought to effectuate [the] merger [of law and equity] and to abolish the distinctions among the [common law] forms of action." *Id.* § 1.7, at 19. In place of the obsolescent forms of common law action, it "created the civil action in which the parties were to plead the facts constituting the cause of action or defense." *Id.* The Code "was intended to make available *all* appropriate remedies in [the single civil] action . . . and also sought to liberalize the provisions for joinder of causes and parties." *Id.*

44. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2082 (1989) ("Elaborate procedure rigorously enforced was the tradition of the Hilary Rules that gave us Baron Parke, who boasted that he had decided many volumes of cases without considering their merits."); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 781 (1993) ("In England . . . the strictures of the writ system and its attendant intricacies and delays created a 'crisis' that was supposedly 'viewed by the public with serious concern.'") (quoting Edson Sunderland, *The English Struggle for*

courts failed to reform these rules, the legislature took the initiative.<sup>45</sup> Legislative rulemaking became an integral part of the code tradition.<sup>46</sup> Therefore, a defining feature of a classic code state is legislative rulemaking. New York, the home of the Field Code, still follows this model.<sup>47</sup> The code movement eventually spread to California, which "pioneered code pleading in the western states."<sup>48</sup>

The early promise of the code movement began to sour as successive legislatures, in response to the importunings of special interest groups, added layer upon layer of amendments to the code. Legislatures sought to regulate every detail of court activity and to remedy procedural problems on a piecemeal and patchwork basis.<sup>49</sup> In New York, the Field Code turned into the Throop Code,<sup>50</sup> and grew "from 88 sections to over 1000, making it a legal text of truly Byzantine complexity, a stellar trap for the unwary, and a source of mischief to hapless litigants."<sup>51</sup> California's code has suffered a similar fate.<sup>52</sup>

Yet, despite the defects in California's civil procedure code caused by generations of legislative rulemaking, California has remained strongly attached to its code tradition. California's civil procedure code currently contains more code features than that of most code states.<sup>53</sup> Consequently, while most states eventually abandoned legislative rulemaking,<sup>54</sup> choosing to emulate the federal reform model of judicial rulemaking em-

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*Procedural Reform*, 39 HARV. L. REV. 725, 728-29 (1926)).

45. Marcus, *supra* note 44, at 781.

46. *Id.*

47. *See supra* note 17.

48. Oakley & Coon, *supra* note 41, at 1383.

49. *See supra* note 17 and *infra* notes 50-52.

50. Marcus, *supra* note 44, at 781.

51. Carrington, *supra* note 17, at 163. "[W]hat followed in New York after 1848 made vivid the deficiency of legislative making of procedural rules. Every time the legislature sat, it would adopt another hat-full of special-interest amendments to the Field Code, marring its clean, simple text finally beyond recognition." *Id.*

52. *See* Kleps, *supra* note 40, at 23 ("A constantly expanding Code of Civil Procedure has been subjected to piece-meal amendment by successive legislatures.").

53. *See* Oakley & Coon, *supra* note 41, at 1383. "[A]lthough it has imported many features of the Federal Rules, California remains committed to code pleading. California practice follows its own terminology even when the devices and procedures . . . are not merely semantic." *Id.*

54. *See supra* note 17.

bodied in the Rules Enabling Act of 1934 (REA),<sup>55</sup> California's legislature has tightly guarded its dominant rulemaking authority.<sup>56</sup>

*C. Complete Rulemaking Authority was Almost Granted to California's Judicial Council by Constitutional Amendment in 1926*

Notwithstanding California's adherence to code pleading and legislative primacy in rulemaking, the judicial reform movement of the early twentieth century, culminating in the enactment of the Rules Enabling Act of 1934, significantly affected judicial administration in California. In 1926, the Judicial Council<sup>57</sup> was created by constitutional amendment.<sup>58</sup> That amendment almost included a provision conferring on the Council full rulemaking power.<sup>59</sup> As originally submitted, the amendment would have

55. Under the Rules Enabling Act, Congress delegated the power to promulgate rules of procedure for the federal courts to the Supreme Court, while retaining only a veto power. 28 U.S.C. § 2072 (1994). The actual work of drafting amendments is done by Advisory Committee members whom the Chief Justice appoints. Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 710-11 (1993). Most of the members of the Advisory Committee are judges, but membership also includes law professors and practitioners. *Id.* at 710 n.183. The Civil Rules Advisory Committee considers all proposed amendments to the Rules of Civil Procedure, circulates them to members of the bench and bar for comment, revises them, and then forwards the revised proposals to the standing Committee on Practice and Procedure, which, in turn, transmits them to the Judicial Conference. *Id.* at 710-11. If approved, the Judicial Council forwards the proposed rule to the Supreme Court. *Id.* at 711. If approved by the Supreme Court, the rule is promulgated and then transmitted to Congress. *Id.* If Congress fails to modify or reject the proposal within a prescribed time period, the rule takes effect. *Id.* at 711-12; *see also* 28 U.S.C. § 2074 (1994). Rules promulgated by the Supreme Court under the REA supersede any inconsistent statutes. 28 U.S.C. § 2072(b) (1994). Professor Stempel characterizes this model of rulemaking process as "judge/legal profession-centered at the top, with a preference for deliberation, uniformity, and neutrality" and calls it the "professional dominance" paradigm. Stempel, *supra*, at 708-10, 730. This model was the unchallenged rulemaking paradigm for the federal courts until 1990 when Congress began to intervene directly in rulemaking. *See infra* notes 80-185 and accompanying text.

56. *See* ROTTMAN, *supra* note 17, at 117 (listing California as the only remaining state whose legislature formulates procedural rules).

57. The "Judicial Council and Unified Control of the Courts" and the "Restoration of the Rule-making Power" were two of six concrete remedial measures of the judicial reform program adopted by the American Bar Association (ABA) around 1910 and promoted by the ABA through the late 1930s. *See* Hugh H. Brown, *Judicial Councils at Work*, 1 CAL. ST. B.J. 52, 63 (1926).

58. CAL. CONST. art. VI, § 6 (amended 1926).

59. Phil S. Gibson, *Chief Justice Urges Effective Plan to Give Courts Rule-Making*

provided the Council with complete rulemaking authority.<sup>60</sup> At the last minute the legislature deleted this provision.<sup>61</sup> It appears from contemporaneous accounts that a majority of the legislature favored granting the Council unrestricted rulemaking power, but that "aggressive opposition" by a single legislator caused the legislature to water down the Council's rulemaking power.<sup>62</sup>

*D. The State Bar and the Judicial Council Supported Vesting the Judicial Council with Complete Rulemaking Power from 1940 to 1960*

Prompted by the adoption of the Federal Rules of Civil Procedure, the Committee of the State Bar recommended in 1940 that the legislature confer full rulemaking authority on the Judicial Council.<sup>63</sup> The Council was "favorably inclined toward such a move."<sup>64</sup> Chief Justice Gibson, Chair of the Judicial Council, opposed the proposal because he believed the Council lacked a permanent research staff to support the task of overhauling the procedure code,<sup>65</sup> and that "[w]ithout this staff, the proposal to vest the rule-making power in the Judicial Council skirts the edge of disaster."<sup>66</sup> Chief Justice Gibson recommended that the legislature grant the Council additional rulemaking authority limited to appellate practice as a calculated first step toward achieving full rulemaking power.<sup>67</sup> A bill was subsequently proposed in the 1941 session of the legislature that would have given the Council complete rulemaking power, but the legislature bowed to Gibson's suggestion and delegated to the

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Power, 15 CAL. ST. B.J. 331, 333 (1940).

60. *Id.*

61. *Id.*

62. Harry A. Hollzer, *The Rule-Making Power*, 3 CAL. ST. B.J. 238, 240 (1929); Brown, *supra* note 57, at 63.

63. Edward Winterer, *Lawyer Group Advocates Giving Rule Making Power to Judicial Council*, 15 CAL. ST. B.J. 250 (1940). "It is about time, in this twentieth century, that California . . . shall advance the methods of the administration of justice from the obsolete and forgotten past to the front line of progress and efficiency." *Id.* at 251.

64. Gibson, *supra* note 59, at 332.

65. *Id.* at 335. Chief Justice Gibson envisioned a team of litigation experts "with a sufficient staff and enough money to do the actual job of drafting the revised rules." *Id.* These experts would "consist of men of varied experience, including judges, law professors, and practicing lawyers." *Id.* at 336. Gibson considered the creation of this staff of experts to be "the heart of the entire reform." *Id.*

66. *Id.* at 336.

67. See Stolz & Gunn, *supra* note 34, at 886. "Acquisition of complete rule-making authority became one of Gibson's primary goals for the Council, and power over the procedure in appeals was a calculated and limited step toward reaching that goal." *Id.*

Council the authority to promulgate rules governing only appellate procedure, with such rules to supersede all conflicting statutes.<sup>68</sup>

The appellate rules that the Council promulgated proved to be "very successful in standardizing and streamlining procedure in the appellate courts and have required only modest changes."<sup>69</sup> This limited delegation of appellate rulemaking power gave Chief Justice Gibson the opportunity to assemble a permanent staff of experts to support the Council's limited rulemaking authority—a "braintrust of lawyers concerned with the drafting of legislation and rules for the centralized reformation of the court system."<sup>70</sup>

In 1957, the State Bar and the Judicial Council once again recommended to the legislature that it amend article VI of the constitution to give the Council complete rulemaking power over all practice and procedure.<sup>71</sup> This time, Chief Justice Gibson endorsed the proposal, believing the Council had developed "considerable rule-making experience and [was now] equipped to give continuous attention to the study and development of effective rules of procedure."<sup>72</sup> The last reference to this proposal was made by Justice Roger Traynor, who expressed the hope that the legislature would place on the November 1960 ballot a proposition

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68. *Id.* at 885-86.

69. *Id.* at 886.

70. *Id.* at 886 n.63. In 1955 the legislature delegated to the Judicial Council authority to prescribe rules governing pretrial conference procedure. Phil S. Gibson, *For Modern Courts*, 32 CAL. ST. B.J. 727, 729 (1957).

71. Gibson, *supra* note 70, at 729.

72. *Id.* at 731. Chief Justice Gibson believed that legislatures were institutionally incapable of formulating effective procedural rules for courts. Specifically, the Chief Justice believed that (1) legislatures, in session for brief periods, cannot devote "continuous attention to the study and development of effective rules of procedure;" (2) most legislators "do not have the legal training necessary to an understanding of judicial practice and procedure;" and (3) "legislators have other and, in a sense, more important tasks of statecraft than the formulation of statutes in this specialized field." *Id.* at 730-31.



giving the Council full rulemaking authority.<sup>73</sup> The legislature never acted on this proposal and it has faded into history.

*E. Since 1960, the Legislature has Shut the Door on Surrendering its Rulemaking Power, and the Judicial Council and State Bar Have Stopped Knocking*

There have been many ironic turns in the history of the rulemaking power in California. First, every California Chief Justice from Gibson through Lucas has advocated the "reformist" position on judicial rulemaking.<sup>74</sup> Second, "the Judicial Council and various professional organizations and coalitions, including judges' groups and the organized bars, have consistently espoused" giving the Council complete rulemaking power.<sup>75</sup> The third ironic twist was that Chief Justice Gibson, a staunch supporter of judicial rulemaking, blocked legislative action in 1941 to give full rulemaking power to the Council until an adequate support staff had been developed.<sup>76</sup> Fourth, although an adequate support staff has been developed, the proposition has never been implemented.<sup>77</sup> Fifth, the Judicial Council and the State Bar appear to have retreated from this issue during the past thirty years,<sup>78</sup> and the great reformist

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73. Roger J. Traynor, *A Time to Build Up*, 35 CAL. ST. B.J. 219, 225 (1960) ("Our state is out of character in lagging behind 30 other states and the federal government, which have already returned the rulemaking power to the judicial branch . . ."). The last public reference to the concept of full judicial rulemaking power was made in 1962 by Ralph N. Kleps, the first Director of the Administrative Office of the California Courts:

Since about 1916 the great majority of judges and lawyers in California have been convinced that a court procedure governed by flexible rules of court is much to be preferred over the complicated patch-work of statutory procedure found in our 1872 practice codes. Great strides have been made in judicial rule-making during the last 20 years in California, and many people believe that the solution to our problems of congestion and delay is to be found in the use of an effective rule-making authority.

Ralph N. Kleps, *California Courts*, 37 CAL. ST. B.J. 329, 337 (1962).

74. Scheiber, *supra* note 33, at 2086; see *infra* notes 101-06 and accompanying text (discussing the reformist positions).

75. Scheiber, *supra* note 33, at 2086.

76. See *supra* notes 59, 70 and accompanying text.

77. In 1960, Chief Justice Gibson's dream of an institutionalized support staff for the Judicial Council was realized when the voters approved the establishment of the Administrative Office of the Courts. Scheiber, *supra* note 33, at 2081-82.

78. The Council has generally retreated from high profile reform issues, focusing its efforts on its administrative role. See Stolz & Gunn, *supra* note 34, at 904. In 1960, the Council made a conscious decision to avoid tangling with the legislature to achieve enactment of the Council's own initiatives for procedural change. Instead, the Council decided "to work within its own sphere of authority over the courts." *Id.* Stolz and Gunn attribute one reason for this retreat from legislative engagement to

goal of judicial primacy in rulemaking has apparently been forgotten. However, the current political environment that surrounds civil procedure should cause California to reconsider the forgotten concept of full judicial responsibility for rulemaking.<sup>79</sup>

## II. THE POLITICIZATION OF CIVIL PROCEDURE: THE FEDERAL RULEMAKING EXPERIENCE SINCE 1980

Since the 1980s, civil procedure has become increasingly politicized as special interest groups have turned to procedure to advance their interests.<sup>80</sup> This use of procedure to advance substantive goals is not only a national phenomenon, but as Part III will illustrate, a California phenomenon as well.<sup>81</sup> This phenomenon has caused Congress to adopt a more assertive role in the federal rulemaking process. In the 1980s, Congress directly intervened several times in the rulemaking process, culminating in the enactment of the Civil Justice Reform Act of 1990.<sup>82</sup> What is so startling about this direct congressional participation in federal rulemaking is that forty years of deference to the rules drafted by the Advisory Committee under the Rules Enabling Act of 1934 preceded this

frustration with the political nature of the legislative rulemaking process. *Id.* "[I]t had become too difficult to accomplish what the Council wanted through legislation; the process was too complex and political to permit full consideration of the judicial system's needs and the most efficient methods of reform." *Id.* This statement by Stolz and Gunn confirms this Article's view that increased politicization of procedure has caused the legislature to be more assertive in its rulemaking role and less inclined to give it up. *See infra* notes 112-33 (explaining reluctance of the legislature to release rulemaking power because of the political nature of the environment).

79. *See infra* notes 80-185 and accompanying text.

80. *See infra* notes 90-193 and accompanying text (describing instances of congressional intervention into procedure to advance interests of members connected with the system).

81. *See infra* Part III.

82. Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 880 (1993); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 456 (1993).

"Traditionally, the rulemaking process of the Advisory Committees has been largely the work of a small group of judges, lawyers, and academicians." Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 799 (1991) (footnotes omitted). "The work of the Advisory Committee has been subject to virtually no public or professional interest, inducing widespread ennui." *Id.* (footnote omitted); *see also* Carrington, *supra* note 17, at 163.

abrupt change.<sup>83</sup> Congressional activism in rulemaking represents a major challenge to the professional dominance paradigm of the rulemaking process.<sup>84</sup>

The impact of the politicization of procedure on expanding Congress's rulemaking role has adverse implications for California's legislative primacy model. The jolting episodes of congressional intervention in the rulemaking process are dramatic evidence of the responsiveness of the legislative branch to procedural politicking by special interest groups. This increased congressional rulemaking activity has also stirred considerable concern among procedural scholars about the adverse effect such intervention can have on the integrity of the federal rulemaking process and on the federal rules themselves.<sup>85</sup> These concerns are equally applicable to California's rulemaking process and procedural rules.

The political influences that have buffeted procedure on the federal level have also impacted California procedure. As discussed in Part III, summary judgment in California has become a political football, and the law of summary judgment has suffered as a result.<sup>86</sup> This Article illustrates the inability of the legislature to fashion a coherent, workable body of procedural rules.

California's legislative primacy rulemaking process cannot be viewed as a quaint but harmless vestige of the code pleading era whose day has passed. The politicization of procedure has made Chief Justice Gibson's

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83. Robel, *supra* note 82, at 880.

84. Stempel, *supra* note 55, at 708. Stempel states that Congress's deference to the judiciary in rulemaking matters

[lasted only] so long as Congress (or the relevant congresspersons influential in judicial policy) are not besieged by interest group pressures at odds with the judiciary's objective, and so long as Congress respects the judiciary enough to defer to it and the Enabling Act process. For the most part, it appears that this set of circumstances prevailed during the 1934-1974 period, enabling civil rules revision to be revised largely by the bench.

*Id.* at 712. Stempel also noted the harmful effects of the Civil Justice Reform Act of 1990 and "other trends which erode the litigation reform model, such as proliferating local rules and standing orders." *Id.* at 731.

85. For example, Professor Carrington, former Reporter for the Advisory Committee on the Civil Rules, expressed his concern that:

Unconstrained review by Congress of rule promulgations, with the substitution of congressional judgment for that of the [United States Supreme] Court, would re-politicize the rules, defeat the neutrality goals of the reform movement, fragment the rules, increase complexity, elevate cost, diminish the stature of the judiciary, and decrease the effectiveness of law enforcement, all without material compensating benefits.

Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 323 (1989).

86. See *infra* notes 186-506 and accompanying text.

lifelong goal of vesting complete rulemaking authority with the Judicial Council not only timely, but urgent.

Sub-part A of this section describes the national phenomenon of the rise of special interest groups in shaping procedure.<sup>87</sup> Sub-part B considers a few episodes of congressional response to interest group lobbying and the concerns which these episodes have generated among commentators.<sup>88</sup> Finally, sub-part C discusses the implications of increased congressional intervention in federal rulemaking for California's legislative primacy model.<sup>89</sup>

#### A. *Politicization of Procedure: The Rise of Factionalism*

The story of the politicization of procedure over the last decade is essentially about the awakening of special interest groups to the potential for shaping procedural rules to advance their particular agendas. These groups have become sophisticated in working the rulemaking process, both in Congress and with the Advisory Committee.<sup>90</sup> Professor Stempel, in his chronicling of the "politicization of litigation issues," observed:

Across the spectrum of interests ranging from the American Tort Reform Association (a manufacturers group seeking more favorable product liability laws) to the Leadership Conference on Civil Rights (a liberal group seeking to protect or expand civil rights laws), America's political actors have increasingly become involved in matters of litigation procedure.<sup>91</sup>

Furthermore, Professor Stempel contends that "law reform has ceased to be a drawing-room pastime of the intelligentsia and has become part of the milieu of down-and-dirty politics."<sup>92</sup>

Different groups have demonstrated a wide range of interests in civil procedure in the past decade. These interests can be categorized as (1) ideological or philosophical—those concerned with the fundamental

87. See *infra* notes 90-133 and accompanying text.

88. See *infra* notes 134-65 and accompanying text.

89. See *infra* notes 166-85 and accompanying text.

90. "There has been a quiet but subtle change in rule reform efforts. The experience of the last ten years suggests that actors in the judicial arena have become increasingly sophisticated concerning the opportunities for accomplishing advantageous rule reform through traditional lobbying efforts." Mullenix, *supra* note 82, at 855.

91. Stempel, *supra* note 55, at 669. For a critique of the lobbying activities of "public interest" advocates (or "partisans"), "falsely imbuing proposed rules with political content," see Mullenix, *supra* note 82, at 822-30.

92. Stempel, *supra* note 55, at 669.

goals, underlying assumptions, and basic direction of the adjudicatory system;<sup>93</sup> (2) "political" in the electoral sense of the term;<sup>94</sup> and (3) pecuniary, referring to perceived gain or loss by a business or profession in terms of income or workload.<sup>95</sup>

### 1. Ideological Interests

There are two ideological interest groups whose members advocate conflicting visions of adjudicatory procedure. One group, the preservationists,<sup>96</sup> seeks to preserve the traditional, liberal open courts paradigm<sup>97</sup> of adjudicatory procedure embodied in the Federal Rules of Civil Procedure since their promulgation in 1938.<sup>98</sup> The primary goals of the open courts paradigm are fair and accurate outcomes achieved through a full and fair hearing on the merits, replete with due process procedural formality.<sup>99</sup> This litigation model is adversarial and lawyer-driven, assigning to each party responsibility for developing and presenting its own case. The judge's role is primarily that of adjudicator. As manifested in the Federal Rules of Civil Procedure, this paradigm stresses "simplicity, liberal pleading, broad discovery, and a preference for substance over form; the primary mission was the just resolution of disputes."<sup>100</sup>

The opposing ideological group, the reformers, believes that the open courts model is a luxury society can no longer afford. The reformers' vision of adjudicatory procedure, the "restrictive procedural paradigm,"<sup>101</sup> emphasizes judicial economy over accurate outcomes,<sup>102</sup> and quantity of outcomes over quality.<sup>103</sup> The key to judicial economy is to promote aggressive case management, by diverting dispute resolution from formal, full-blown adjudication to alternative, less formal settings like mediation, arbitration, and settlement, and by more aggressive use of summary judgment.<sup>104</sup> This litigation model accelerates the shift of the

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93. See *infra* notes 96-106 and accompanying text.

94. See *infra* notes 107-23 and accompanying text.

95. See *infra* notes 124-33 and accompanying text.

96. Stempel, *supra* note 55, at 689.

97. Professor Stempel created the "open courts paradigm" concept. *Id.* at 714.

98. *Id.*

99. *Id.*

100. *Id.*

101. Professor Stempel also created the term "restrictive procedural paradigm." *Id.* at 718.

102. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 534 (1986).

103. *Id.* at 540.

104. *Id.* at 534.

adjudicatory system away from the adversarial litigation model.<sup>105</sup> The restrictive access paradigm views the judge less as an adjudicator and more as a case manager, whose primary role is to move a lawsuit from filing to disposition.<sup>106</sup>

## 2. Partisan Interests: The Political Parties

The two political parties have taken sides in this conflict of the procedural paradigms. Republicans, urged on by business interests, generally support the reformers and the restrictive adjudicatory procedure paradigm, while Democrats, backed by groups such as trial lawyers and public interest lawyers, support the traditional open courts paradigm.<sup>107</sup> According to Stempel, the "Republican ascendancy and dominance of presidential politics during the 1968-1992 period" largely accounts for the shift in thinking about litigation procedure.<sup>108</sup> Presidential appointments of conservative judges throughout the federal judiciary, from the Chief Justice to district court judges, provided a powerful boost for the restrictive procedure paradigm.<sup>109</sup>

A watershed event that accelerated the melding of electoral politics and procedure during this period was the Reagan Administration's establishment of the President's Council on Competitiveness.<sup>110</sup> The Council advanced the Reagan Administration's agenda for civil justice reform.<sup>111</sup> Vice President Dan Quayle unveiled its fifty-point "Agenda for Civil Justice Reform in America" in a speech delivered at the American Bar Association's 1991 summer meeting.<sup>112</sup> The proposals were typical of

105. Stempel, *supra* note 55, at 718.

106. Resnik, *supra* note 102, at 534.

107. See *infra* notes 124-33 and accompanying text (discussing pecuniary interests).

108. Stempel, *supra* note 55, at 719.

109. *Id.* at 719-20. Professor Stempel suggested that:

[T]he appointments of Chief Justices Burger in 1969 and Rehnquist in 1986 meant that conservative jurists frequently critical of the open procedural paradigm could spend more than two decades placing kindred spirits in positions of influence. Despite the growing pressure upon and dissatisfaction with the open courts model, it might well have survived if instead Justice Brennan had become Chief Justice in 1969, to be replaced by, for example, Judge A. Leon Higgenbotham of the Third Circuit or Judge Abner Mikva of the District of Columbia Circuit.

*Id.*

110. *Id.* at 720.

111. *Id.*

112. Deborah R. Hensler, *Taking Aim at the American Legal System: The Council*

most civil justice reform, or tort reform, proposals, and are consistent with the restrictive adjudicatory procedure paradigm.<sup>113</sup> The Council's program included "encourag[ing] the use of ADR; expand[ing] the use of settlement conferences; limit[ing] the amount of discovery and penaliz[ing] discovery abuse; set[ing] early and firm trial dates; encourag[ing] greater use of summary judgement; and limit[ing] diversity jurisdiction."<sup>114</sup>

In explaining the Council's agenda, Vice President Quayle emphasized that the high costs which the legal system imposes on American businesses place them at a competitive disadvantage in the global marketplace.<sup>115</sup> He placed the blame on the so-called litigation explosion<sup>116</sup> and a surfeit of U.S. lawyers.<sup>117</sup> Reformers commonly use these themes to justify civil justice reform. Vice President Quayle claimed that the

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on *Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244 (1992). But see Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251 (1992) (rebutting Dr. Hensler's critique of the Quayle Report). Stempel called the August 1991 publication of the *Agenda for Civil Justice Reform in America*, commonly referred to as the "Quayle Report," "another important upheaval on the court reform landscape." Stempel, *supra* note 55, at 687.

113. See, e.g., AMERICAN LEGISLATIVE EXCHANGE COUNCIL, SOURCEBOOK OF AMERICAN STATE LEGISLATION, PART II: "CIVIL JUSTICE" ch. 3 (1995) (The chapter is entitled "Alternative Dispute Resolution Act, Pre-Complaint Notice Act, Offer of Settlement Act, Summary Judgment Procedure Act, Litigation Accountability Act, Civil Procedure Rule Equity Resolution, and Accuracy in Pleading Act.").

114. Hensler, *supra* note 112, at 245.

115. *Id.* at 244.

116. Stempel notes that Quayle's "thesis that America was in the midst of a litigation crisis requiring dramatic action" is regarded by the "consensus of scholarly opinion [as] inadequate[] and erroneous[]." Stempel, *supra* note 55, at 687 (citing Hensler, *supra* note 112, and Milo Geyelin, *Quayle's Data in Proposed Reform of Legal System Called Misleading*, WALL ST. J., Feb. 4, 1992, at B7 (summarizing criticisms of Professor Marc Galanter and others)). Stempel adds that "as a document the Report and its most drastic recommendations have enjoyed little or no support among the aggregate organized bar or the legal academy." Stempel, *supra* note 55, at 687 n.109.

Judge Weinstein notes: "The truth about the 'litigation explosion' is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access." Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 901, 909 (1989). Weinstein quotes Professor Rotunda's comment that the "increased talk of the litigation crisis may tell us more about the public relations expertise of insurance companies than anything else." *Id.* at 909 (quoting Ronald D. Rotunda, *ABA Offers Trite Reforms to Defuse Fictional Litigation Crisis*, MANHATTAN LAW., Aug. 16-22, 1988, at 12); see also Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Marcus, *supra* note 44, at 763.

117. Hensler, *supra* note 112, at 244.

Council's proposals would "improve the delivery of justice to American citizens,' 'empower people with disputes,' and 'make it easier for citizens to vindicate their legal rights.'"<sup>118</sup>

Deborah Hensler, a senior social scientist at Rand's Institute for Civil Justice, questions the candidness of these populist claims. She sees many of the Council's "procedural" proposals as masking, in essence, a substantive political agenda aimed at "chang[ing] the current balance between individual plaintiffs and corporate defendants, in favor of the latter."<sup>119</sup>

The use of procedurally neutral camouflage to pitch what could be viewed as an unpopular substantive agenda is a common political tactic. Judge Weinstein, Chief Judge of the Eastern District of New York and a vocal critic of this tactic, writes that "[t]he issue [of the desirability of free entry to our courts] is raised in a variety of somewhat disingenuous guises, camouflaged under values like 'administrative efficiency.'"<sup>120</sup>

This conservative reform agenda was carried into the congressional arena when the Republicans won control of both houses of Congress from the Democrats in 1995.<sup>121</sup> The historic shift of congressional control from left to right finds its parallel in the California legislature where, in 1995, the conservative leadership of the Republican Party assumed

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118. *Id.* at 244-45 (quoting the Vice President's speech to the ABA).

119. *Id.* at 250.

120. Weinstein, *supra* note 116, at 1907; see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 439 (1992). Mullenix commented on the Civil Justice Reform Act of 1990 which embodied many of the proposals contained in the "Quayle Report":

Ultimately, what is so disturbing about the Civil Justice Reform Act is the blatant as well as disguised political agendas behind the legislation. The blatant agenda is to improve American business competitiveness domestically and abroad; the disguised political agenda is to remove disagreeable cases and disagreeable litigants from the federal courts.

*Id.*; see also Judith Resnik, *The Domain of the Courts*, 137 U. PA. L. REV. 2219, 2226 (1989).

121. Tony Mauro, *Contract with America/The Common Sense Legal Reform Act*, USA TODAY, Nov. 17, 1994, at 10A.



control of the Assembly.<sup>122</sup> The state Senate has been targeted for a Republican takeover in the future.<sup>123</sup>

### 3. Pecuniary Interests

Businesses, particularly repeat-player defendants in personal injury lawsuits (e.g., drug manufacturers) and securities litigation (e.g., the computer industry), have been particularly active lobbyists for the restrictive access paradigm. Certain professions directly involved in the judicial system, including court reporters<sup>124</sup> and process servers,<sup>125</sup> have actively lobbied, somewhat effectively, to blunt proposed procedural reform, which they perceived would affect their livelihood.<sup>126</sup> Judges also stand to gain from the current round of procedural reform because the advancement of the goals of the restrictive access paradigm would reduce their workload as well.<sup>127</sup>

Other members of the legal profession whose pecuniary fortunes are affected by procedural reform are lawyers.<sup>128</sup> The trial lawyers' associations wield considerable influence among Democrats in the halls of Congress and the halls of the state legislature in Sacramento.<sup>129</sup> The trial lawyers' political game, in contradistinction to that of conservatives, is to preserve the procedural status quo and to oppose conservative efforts at litigation reform.<sup>130</sup> The proverbial bread of the trial lawyers is buttered on the side of preserving the open courts paradigm. Trial lawyers have a vested interest in the traditional paradigm because their clients are usually plaintiffs<sup>131</sup> who are "disproportionately comprised of society's 'have

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122. See Eric Bailey et al., *Republican Reign—Orange County Conservatives and the Pursuit of Power: O.C. GOP Setting Sights on the State*, L.A. TIMES (Orange County Edition), July 7, 1996, at A1. The Democrats regained control of the Assembly in the November 1996 election, but only by a "paper thin" majority. See *supra* note 8.

123. Bailey, *supra* note 122, at A1.

124. See *infra* note 170 and accompanying text (discussing court reporters).

125. See *infra* notes 142-46 and accompanying text (discussing process servers).

126. Stempel, *supra* note 55, at 719.

127. Judges who support the goals of the restrictive access paradigm can be motivated by ideology as well as self-interest.

128. Within the legal profession in California, tort reform divides the plaintiffs' and defendants' bars. Scheiber, *supra* note 33, at 2116 (discussing factionalism in tort reform issues).

129. Douglas Frantz, *Trial Lawyers, Their Money and Their Influence Become Issues in the Campaign*, N.Y. TIMES, Sept. 13, 1996, at A18.

130. *Id.*

131. "[T]he American Trial Lawyers Association, comprised largely of plaintiffs' personal injury lawyers, is reputed to have considerable lobbying clout with Congress, due in substantial part to the grassroots contacts of its membership." Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary*

nots': individuals, business sole proprietorships, and smaller entities," whereas "[d]efendants are disproportionately comprised of society's 'haves': banks, insurance companies, railroads, business organizations, governments, and government agencies" who have an economic interest in raising the barriers to litigation.<sup>132</sup> Similarly motivated by economic self-interest, defense lawyers, representing society's "haves," support civil justice reform proposals.

A particular group can complicate this simplified picture of interests affected by procedural change by grinding more than one ax, or pretending to grind one ax (usually involving ideology or philosophy) when they are actually grinding another. Many interest groups are disingenuous about their true aims, camouflaging a substantive agenda behind the cloak of neutral procedural reform.<sup>133</sup>

#### *B. Politicization of the Rulemaking Process: Direct Congressional Intervention in Federal Rulemaking*

As mentioned earlier, Congress, under the REA, delegated to the judicial branch the power to formulate and promulgate the rules of procedure for the federal courts.<sup>134</sup> The REA prescribes the process by which the Advisory Committee formulates rule changes and ultimately transmits the changes to the Supreme Court for formal adoption.<sup>135</sup> Under the

*Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 162 n.345 (1988).

132. *Id.* at 161; see also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 L. & SOC'Y REV. 403 (1987).

133. See Jack Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829 (1993). "As guardians and keepers of the rules, proceduralists have a duty to flush out these substantive arguments from behind their procedural camouflage, exposing them to open and honest debate." *Id.*; see also Mullenix, *supra* note 82, at 856 ("There is a good deal of disingenuousness in the air . . . . [I]t would do a great deal to clear the air if all involved in the rule reform process were more forthright about whose oxen are being gored or protected."); Marcus, *supra* note 44, at 773 ("[W]hether the innovation in question is advanced by representatives of the insurance industry or by the American Trial Lawyers Association . . . the real objective of the one proposing the change may be to become a winner, not to achieve whatever loftier goals are invoked to justify the change.").

134. See *supra* note 55.

135. See Rules Enabling Act, 28 U.S.C. §§ 2073, 2077 (1994) (discussing the Advisory Committee and the method by which they develop and approve rules); see also *supra* note 55.

REA, Congress retains only a veto power over rule changes.<sup>136</sup> The judiciary, whose rules supersede any inconsistent statutes, has the initiative for rulemaking.<sup>137</sup>

In 1990, Congress made a major thrust into the rulemaking process when it enacted the Civil Justice Reform Act, effectively circumventing the procedures prescribed by the REA.<sup>138</sup> This intervention caused a major upheaval in the hitherto settled process. Intermittent rumblings, however, were heard several years before this major tremor struck. These earlier interventions demonstrate the problems of politicization.<sup>139</sup>

#### 1. "Partisan Pork Barrel" Procedure<sup>140</sup>

Partisan pork barrel procedure refers to congressional intervention in procedure to advance the narrow, pecuniary interests of the members of professions connected with the judicial system.<sup>141</sup> Two episodes of such intervention illustrate the responsiveness of the legislative branch to such efforts.

In 1982, the National Association of Process Servers (N.A.P.S.) objected to an amendment to Rule 4, proposed by the Advisory Committee, which authorized the use of registered or certified mail for service of process.<sup>142</sup> Congress responded to the Association's lobbying efforts by postponing the effective date of the proposed amendment.<sup>143</sup> The proposed amendment was the product of four years of Advisory Committee deliberation.<sup>144</sup> In four months, Congress hastily drafted and enacted its

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136. See Rules Enabling Act, 28 U.S.C. § 2074 (1994); see also *supra* note 55.

137. See *supra* note 55 and accompanying text.

138. See Civil Justice Reform Act, 28 U.S.C. §§ 471-482 (1994). For a general discussion of the Civil Justice Reform Act, see Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systematic Ills Afflicting the Federal Courts be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993).

139. The earliest significant episode of congressional rulemaking is the enactment of the Federal Rules of Evidence in 1974. Congress spent two years making substantial revisions in the evidence rules developed by the Advisory Committee under the REA and then decided to pass its own evidence statute. Carrington, *supra* note 17, at 163-64.

140. This Article purloins the term "partisan pork barrel" from Professor Mullenix. Mullenix, *supra* note 82, at 848.

141. *Id.*

142. For an excellent discussion of the legislative process, see Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1197-1212 (1987).

143. *Id.* at 1207-08.

144. Mullenix, *supra* note 82, at 848.

own Rule 4 revision without hearings or debate.<sup>145</sup> One writer commented:

[The interests of the N.A.P.S.] prevailed over those of rulemaking, leaving us to imagine what the American Association of Retired Persons or the National Rifle Association might be able to do to the rules if motivated. It deserves note that the effort of Congress in drafting a revision of Rule 4 did not receive high marks. Kent Sinclair has described the rule as enacted to be "pregnant with difficulties."<sup>146</sup>

The second instance of pork barrel procedural legislation occurred in 1988 when Congress amended Rule 35 to allow a court to order mental examinations conducted by licensed clinical psychologists, in addition to psychiatrists or psychologists who are also physicians.<sup>147</sup> Professor Carrington recounts that Senator Daniel Inouye, whose daughter-in-law is a clinical psychologist in Hawaii, proposed the amendment as a rider to an omnibus drug bill.<sup>148</sup> Senator Inouye's amendment had been previously proposed in 1987, but Congress did not act upon it "out of deference to the Rules Enabling Act."<sup>149</sup> The Congressional Record notes that "[i]t would be appropriate for the Judicial Conference's Advisory Committee on Civil Rules to address whether Rule 35(a) should be amended to include licensed or certified psychologists."<sup>150</sup> By the following year, the Civil Rules Committee had considered and approved the proposed amendment, but Senator Inouye "was unwilling to await the lengthy rulemaking process and so his amendment became effective without any public notice whatsoever, in seeming defiance of the provisions of the Rules Enabling Act adopted only 14 days earlier."<sup>151</sup> Carrington commented that this kind of legislative tinkering with procedure "is an excellent example of the kind of legislation that turned the New York Field Code of 1848 into a monstrosity."<sup>152</sup>

The foregoing episodes of special interest groups advancing their pecuniary interests at the expense of procedural integrity raise the concern that, once Congress starts down the slippery slope of directly drafting

145. *Id.*

146. Carrington, *supra* note 17, at 164; see also Mullenix, *supra* note 82, at 845-46 (commenting that this "[R]ule 4 legislative saga" demonstrates that "[t]ime pressure often induces Congress to act quickly, affecting the deliberative process negatively").

147. Carrington, *supra* note 17, at 165.

148. *Id.*

149. Walker, *supra* note 82, at 461.

150. *Id.* (citations omitted).

151. Carrington, *supra* note 17, at 165. The "provisions of the Rules Enabling Act adopted only 14 days earlier" refers to the 1988 amendments to the REA. *Id.*

152. *Id.*

procedural rules in response to special interests, a momentum develops in this direction and the rulemaking process begins to unravel as the procedural system gets picked apart by factional interests.<sup>153</sup>

## 2. The Civil Justice Reform Act of 1990

The growing momentum of direct, congressional intervention in the rulemaking process culminated in the enactment of the Civil Justice Reform Act of 1990 (CJRA).<sup>154</sup> The CJRA created ninety-four community advisory groups, one for each federal judicial district.<sup>155</sup> The membership of each group was drawn from local lawyers and consumers of legal services, but not the bench.<sup>156</sup> Under the CJRA, each advisory group had to formulate and recommend to the local federal district court a "civil justice and expense and delay reduction plan."<sup>157</sup> The CJRA required each federal district court to promulgate such a plan.<sup>158</sup>

The CJRA has drawn fire from many commentators. In enacting this statute, Congress has been criticized for (1) taking rulemaking power away from the judiciary and giving it to local, lay, advisory groups;<sup>159</sup> (2) yielding to the pressure of powerful interest groups seeking to shape procedure to benefit their self-interest;<sup>160</sup> (3) camouflaging as procedural reform what is essentially a substantive agenda that benefits "repeat players" in litigation;<sup>161</sup> (4) acting in haste to create a "bad piece of leg-

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153. *Id.* at 165-66. Referring to the lobbying successes of the N.A.P.S. and of the clinical psychologists of Hawaii, Carrington expressed the following concern about congressional rulemaking: "If Congress is responsive, as is its wont, to every faction in the United States that detects a possible stake in a proposed amendment to the rules, the rulemaking tradition is doomed to disintegrate." *Id.*

154. Stempel, *supra* note 55, at 684. "In 1990, . . . with [the] passage of the CJRA, Congress thrust itself into the field of litigation policy and procedure in a manner regarded as unprecedented by many and as unconstitutional by at least one prominent commentator." *Id.*

155. Mullenix, *supra* note 120, at 376.

156. Stempel, *supra* note 55, at 684.

157. Mullenix, *supra* note 120, at 376.

158. Stempel, *supra* note 55, at 684. *See generally* Mullenix, *supra* note 120, at 376-77 (discussing the impending nationwide revolution in this area).

159. *See* Mullenix, *supra* note 120, at 377 ("The Act mandates local, grassroots rulemaking by civilian advisory groups, a novel process that essentially circumvents the usual judicial advisory committee system for civil procedure reform that has been in place since 1938.").

160. *See id.* at 439 ("Procedural rules will be shaped to favor those groups with the most effective lobbyists in Congress or the local advisory groups."); *see also* Marcus, *supra* note 44, at 805 ("Whatever the reality of a hidden agenda underlying the [CJRA], it is undeniable that moneyed interests have a more direct, even sanctioned, avenue of access to the traditional political process.").

161. Mullenix, *supra* note 120, at 439. "[T]he disguised political agenda is to remove disagreeable cases and disagreeable litigants from the federal courts." *Id.*

isolation";<sup>162</sup> (5) assuming, without verifying through empirical studies, the existence of serious delays in civil litigation;<sup>163</sup> (6) mandating from each district court a "patchwork of local innovation without concern for the process of [centralized] federal rulemaking [by the Advisory Committee in Washington]";<sup>164</sup> and (7) seeking to regulate "the minutiae of judicial activity."<sup>165</sup>

### 3. Implications for California's Legislative Primacy Model

These episodes of congressional intervention in federal court rulemaking, in direct response to rising interest group pressure, have aroused the concern of federal judges<sup>166</sup> and procedural scholars.<sup>167</sup> The prospect of frequent congressional intervention has ominous implica-

162. *Id.* at 400.

163. See Marcus, *supra* note 44, at 801-02 ("[D]espite Congressional findings of serious delay problems, there was limited evidence, empirical or other, to support this conclusion. To the contrary, Congress had available, but disregarded, a Rand Corporation study showing no significant increase in delay in civil litigation in the federal system since 1971.").

164. *Id.* at 803.

165. *Id.*

166. Testifying before the Senate Committee on the Judiciary on behalf of the Judicial Conference, in opposition to the CJRA, Judge Robert F. Peckham stated:

"We fear that enactment of this statute could result in real harm to the rule-making process that has served both Congress and the court so well for so long. . . . As we who have sat on the bench for some time have discovered . . . procedural matters are extraordinarily complex. They can not only influence, but fix, the outcome of litigation. New rules can have a great many unforeseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive."

Mullenix, *supra* note 120, at 416 n.167 (quoting *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 91-184, 333-44 (1990) (statement of Robert F. Peckham, Judge)). Testifying before the House subcommittee, Judge Peckham also stated: "Judges feel very strongly about judicial involvement in the [rulemaking] process, particularly when the subject relates to procedural matters that go to the core of the performance of the judicial function." *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 105-06 (1990) (statement of Robert F. Peckham, Judge).

167. For a summary of the widespread misgivings over congressional assertiveness in procedural rulemaking, see Marcus, *supra* note 44, at 765-66; see also Walker, *supra* note 82, at 455-64, 469-75.

tions for the federal rulemaking process and the federal rules themselves.<sup>168</sup> These concerns and implications are especially applicable to California's rulemaking process, given the legislature's dominant role in that process.

The national phenomenon of the politicization of procedure has been mirrored in California as well. Special interest groups have not restricted their lobbying activities to Congress; they have also lobbied the California Legislature, and the electorate directly through the initiative process, for procedural advantage.<sup>169</sup> In 1993, the California Court Reporters Association defeated legislation that would have authorized the electronic recording of proceedings in California courts.<sup>170</sup>

It is no secret that legislators are directly dependent upon interest groups for campaign contributions and other electoral support. Legislatures are peculiarly vulnerable, and therefore, responsive to lobbying.<sup>171</sup> One of the adverse consequences of legislative rulemaking for procedure,

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168. In a Memorandum to the Advisory Committee on Civil Rules, Professor Carrington, serving as the Committee Reporter, warned that the Civil Rules will soon be "decorated with special interest" legislation if Congress intervenes frequently in the rulemaking process. Carrington, *supra* note 17, at 163. Carrington then drew a parallel between recent congressional intervention and the New York State Legislature's repeated legislative tinkering with the Field Code in response to special interests, which caused that former model of reform to deteriorate into the Byzantine complexity of the Throop Code. *See supra* note 17. "This is a fate that befell the Field Code in New York in the 19th century, and it is an accident waiting to happen to federal reform now." Reporter, MEMORANDUM TO CIVIL RULES COMMITTEE RE QUESTIONS ABOUT THE RULEMAKING PROCESS 13 (October 18, 1989); *see also* Stempel, *supra* note 55, at 730 ("Although a new [rulemaking] structure may emerge or the previous consensus may reassert itself, litigation reform may also devolve into a fragmented regime of controlled chaos rather than the emergence of a new paradigm.").

169. *See supra* note 170 and accompanying text (referring to successful lobbying efforts of California court reporters) and *infra* note 467 and accompanying text (noting Assembly Bill 3113 supporters); Proposition 201, Shareholder Litigation Reform Act (defeated in general election Mar. 26, 1996), *reprinted in* 2 CAL. LEGIS. SERVICE A-22 to A-27 (1996) (regarding fee shifting); Proposition 202, Lawyer Contingent Fee Limitation Act (defeated in general election Mar. 26, 1996), *reprinted in* 2 CAL. LEGIS. SERVICE A-28 to A-30 (1996) (regarding contingent fees).

170. Professor Marcus cited this episode in his treatment of the political influences in the federal rulemaking process. Marcus, *supra* note 44, at 771-72 n.45.

171. It is, of course, true that lobbyists have also been actively at work in the Advisory Committee. The Advisory Committee became more exposed to lobbying activity after the 1988 amendments to the Rules Enabling Act opened up the Committee's hearings to greater public participation. *See generally* Mullenix, *supra* note 82, at 843-55 (discussing the lobbying efforts rulemakers have encountered). The Advisory Committee is not directly dependent upon interest groups, financially or otherwise, and has usually maintained a neutral perspective in rulemaking. *See* Marcus, *supra* note 44, at 816 ("Even without a new or riveting paradigm, reformers can be moved by more than the self-interest of the loudest or best-financed supplicant, and this is the orientation the Advisory Committee has assumed.").

in the current politically charged procedural environment, is the loss of a neutral approach to rulemaking.<sup>172</sup>

Many writers have argued that the neutralist perspective to rulemaking that underlies the advisory committee system of the REA should be preserved in some form and that procedural rulemakers should be motivated by the public interest rather than narrow special interests.<sup>173</sup> Most believe that procedural neutrality cannot be achieved by returning rulemaking authority to the legislative branch.<sup>174</sup> The recent episodes of congressional rulemaking have raised pointed concerns about the capacity of legislative rulemakers to be neutral. First, legislatures will enact laws favoring powerful interest groups at the expense of the disenfranchised, sometimes masking substantive changes as civil justice reform.<sup>175</sup> Second, the body of procedural rules will proliferate into a complexity of special interest "pork barrel" legislation.<sup>176</sup> Third, interest groups who perceive that a proposed rule change could adversely impact their pecuniary interests will block passage of amendments that benefit

172. Professor Carrington, an advocate of procedural neutrality, wrote:

Procedure rules that are, or are even seen to be, designed to favor one set of litigants produce outcomes that are less acceptable to their adversaries. . . . Equal Protection of the Law requires a "level playing field" in legal dispute resolution.

Moreover, if the procedure rules were the result of a test of strength among political organizations, it is obvious . . . that rules would generally favor those litigants with the greater resources, especially those identifiable "repeat players" who have the larger stakes in procedure rules and hence the greater political energy.

Carrington, *supra* note 44, at 2074-75 (footnotes omitted).

173. See, e.g., Stempel, *supra* note 55, at 752. "[C]ivil rulemaking should not be transformed into a completely political or partisan enterprise. Instead, the reform process should . . . work toward nonpartisan attitudes in rulemaking . . . ." *Id.*; Marcus, *supra* note 44, at 762 ("I argue that we . . . should continue to endorse the pursuit of a neutralist rulemaking process."); Carrington, *supra* note 44, at 2074-85 (discussing the principles of generalism and flexibility in support of political neutrality).

174. See *infra* note 181.

175. An example of this type of legislation is the CJRA. See *supra* note 120 and accompanying text.

176. See *supra* notes 147-52 and accompanying text (concerning the special interest amendment to Rule 35 to benefit clinical psychologists). Judicial reformers who advocated judicial, over legislative, rulemaking had a "clear desire to avoid the politics of legislative log-rolling with procedural doctrine as one of the logs." A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 895 (1993).



the public interest.<sup>177</sup> Other concerns raised by congressional intervention in the rulemaking process include the enactment of hastily and sloppily drafted procedural statutes,<sup>178</sup> the failure to identify sufficient empirical studies that support the existence of a perceived procedural problem (e.g., the "litigation explosion") and justify the proposed solutions,<sup>179</sup> and the drafting of overly particularized and cumbersome statutes.<sup>180</sup>

While academics offer a variety of proposals for saving the federal rulemaking process from disintegrating into chaos, it is significant to note that most do not favor a return to legislative rulemaking.<sup>181</sup> The swing of the procedural pendulum toward legislative rulemaking is re-awakening memories of the legislative abuses of the old code era.<sup>182</sup> The upheaval in federal rulemaking is challenging procedural scholars to reassess the settled assumptions about the rulemaking process which underlie the professional dominance litigation reform model.<sup>183</sup> The

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177. See *supra* notes 142-46 (describing the efforts of the National Association of Process Servers to block an amendment to Rule 4 permitting service by certified mail) and *supra* note 170 (referring to the successful efforts of the California Court Reporters Association to block legislation allowing court reporting by electronic means).

178. See *supra* note 172 and accompanying text; see also analysis of the California summary judgment statute *infra* Part III.D.-F.

179. Marcus, *supra* note 44, at 801-02.

180. One cause of over-particularized procedural legislation is the penchant of legislatures for regulating the "minutiae of judicial activity." *Id.* at 803; Carrington, *supra* note 44, at 2082-83. Professor Carrington identifies a specific problem with over-particularized statutes: "Elaborate procedural principles carefully designed to prevent judges from falling into error become themselves centers of costly dispute tending to distract decision-making away from substantive merits to alleged procedural miscues." *Id.* at 2082.

181. See, e.g., Marcus, *supra* note 44, at 817. "Even while lambasting the existing rules process in 1976, Professor Lesnick acknowledged that '[i]t would be difficult to find a supporter of a return to the days of legislative rule-making.' [sic] Developments since then do not call for a change of view." *Id.* (quoting Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 579 (1975)); see Mullenix, *supra* note 120, at 439; Walker, *supra* note 82, at 460.

The chief alternative [to judicial rulemaking] is legislative rulemaking, an alternative that diminishes the pertinent knowledge of the rulemaker. At best, the initial work might be done by legislators who are also attorneys, but enactment would almost certainly be left to a majority of legislators with no expertise at all.

*Id.*

182. See *supra* note 17 and accompanying text.

183. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 854-55 (1993).

It is time for a breather, for a group that includes rulemakers, members of Congress and members of the bar carefully to review where we have been,

dangers inherent in placing politically charged procedural issues in the hands of politicians who are directly beholden to organized interest groups, apparent to judicial reformers at the beginning of the twentieth century, are becoming apparent once again. The following rhetorical question raised in 1929 by a member of the Los Angeles Bar and then-President of the American Bar Association (ABA) to the ABA's Memphis convention is as timely today as it was then:

Who is best qualified to determine what is essential and vital in order that issues may be properly framed—a legislator, whose vote is often given as a matter of trade or courtesy, or a body of judges and practicing lawyers, working in harmony of purpose, well versed in the substantive law and learned by long years of practice in procedure?<sup>184</sup>

The current upheaval in federal rulemaking should motivate California to rethink its legislative primacy rulemaking model. This Article proposes that the current politicization of procedure, which is at play in California as it is in the rest of the nation, makes Chief Justice Gibson's campaign for judicial primacy in rulemaking<sup>185</sup> timely once again.

The following history of summary judgment in California is intended to provide a contemporary illustration of the deficiencies of the legislative rulemaking process by focusing on a rule that most would consider procedural, yet politically charged, and which falls within the constitutional competence of the legislature to amend.

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where we are going and where we should be going. It is time for a moratorium on ignorance and procedural law reform.

*See also* Lesnick, *supra* note 181, at 579 ("The recent experience with the Federal Rules of Evidence makes it clear that there should be a re-examination of the federal rule-making process. We should not return to the days of congressional rule making for the courts, but it needs to be recognized that the present system has serious shortcomings, and new directions should be explored."); Marcus, *supra* note 44, at 822 (opposing the call among some scholars for a "more political rules process"). Professor Walker argues "that further politicization of the process should be avoided by sharply limiting the discretion of the Advisory Committee, thus clearly differentiating the role of the Committee from the role of elected officials." Mullenix, *supra* note 82, at 799-800 (Professor Mullenix, referring to a provision in the 1988 Judicial Improvements and Access to Justice Act "permitting greater public access to the civil rulemaking processes of the Advisory Committees," frames the "ultimate issue raised by the recent rulemaking reform . . . who should make the rules?"); Walker, *supra* note 82, at 463 (opposing Paul Carrington's suggestion "that an appropriate response to the politicization of civil rulemaking would be formation of a group to lobby Congress on behalf of the product of the current process").

184. Gurney E. Newlin, *The Rule-Making Power*, 4 CAL. ST. B.J. 162, 163 (1930).

185. *See supra* notes 65-68 and accompanying text.

### III. THE SAGA OF SUMMARY JUDGMENT IN CALIFORNIA: AN EXAMPLE OF "BAD" PROCEDURE

#### A. Introduction

The survey in Part II discussing the rise of interest group politics as a major force in shaping federal procedure, both in the Advisory Committee and especially in Congress, provides evidence of the inadequacy of rulemaking through the political process.<sup>186</sup> Recent instances of the amendment (or attempted amendment) of the federal rules by political "logrolling"<sup>187</sup> have generated concern by commentators that the federal procedural system could be picked apart by special interests.<sup>188</sup> Additionally, the increasing tempo of congressional intervention in federal rulemaking could impair public respect for the integrity of the federal rulemaking process. Unlike substantive law, procedural rules are the "rules of the game," and their legitimacy depends on "a 'level playing field.'"<sup>189</sup> The public perception that procedural rulemaking is "a test of strength among political organizations"<sup>190</sup> risks reducing the legitimacy of both the process and the procedural system produced by the process.

The critique of California's summary judgment experience, which this Article presents in this section, provides more evidence of the inadequacy of California's legislative primacy process, and confirms the concerns of procedural scholars about the negative implications of congressional rulemaking for federal procedure. The underlying premise of this critique is that "bad" procedural rulemaking process produces "bad" procedure.<sup>191</sup>

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186. See *supra* notes 80-185 and accompanying text.

187. Logrolling is defined as "the trading of votes by legislators to secure favorable action on projects of interest to each one." WEBSTER'S NEW COLLEGIATE DICTIONARY 1895 (G. & C. Merriam Co. 1986). One of the goals of federal rulemaking reform was "a clear desire to avoid the politics of legislative log-rolling with procedural doctrine as one of the logs." Levin, *supra* note 176, at 895; see also Levin & Amsterdam, *supra* note 14, at 10 ("[L]egislatures are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a bar association molders in committee . . .").

188. Carrington, *supra* note 17, at 165-66.

189. Carrington, *supra* note 44, at 2074. But note contrary views of those who view the "substance"/"procedure" distinction as illusory: advocates of non-trans-substantive rules. *Id.*

190. *Id.* at 2074-75.

191. Part III of this Article contends that the cause of the current confusion in California summary judgment law is the legislative primacy model as it functions in today's highly politicized procedural environment. See *infra* notes 192-506 and accompanying text.

*B. Standards for Determining "Good" and "Bad" Procedure*

In the abstract, there is a consensus that the goals of a procedural system, and of individual procedural rules, are fairness and justice achieved with efficiency and economy.<sup>192</sup> Procedural rules that are fair and just should facilitate accurate outcomes based upon the law and the evidence. These concepts imply giving each party a reasonable opportunity to assemble its case and to present it at a hearing, where it will receive careful and unbiased, or party-neutral, deliberation.<sup>193</sup> Additionally, the procedural rules should give parties the satisfaction of feeling that they have been dealt with fairly.<sup>194</sup> Commentators have expressed concern that the increased politicization of the rulemaking process will unfairly skew the rules in favor of those litigants, usually "repeat players," who have greater resources and motivation to influence the political process.<sup>195</sup>

On the other side of the coin, outcomes can hardly be deemed fair if they are so time-consuming and expensive that only well-off individuals and corporations can afford to litigate. Therefore, most would agree that procedural rules should provide just results efficiently and economically.<sup>196</sup> Rule 1 of the Federal Rules of Civil Procedure embodies these goals: "[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."<sup>197</sup>

The current controversy among politicians and scholars arises over what these abstract terms mean in the context of the detailed operation of a procedural system. The source of this controversy revolves around

192. "We can expect near universal support for the goals of justice, dispatch, and economy in litigation." Carrington, *supra* note 44, at 2077 (discussing the impact of the Federal Rules of Civil Procedure).

193. FLEMING JAMES, JR., CIVIL PROCEDURE § 1.1, at 2 (1965) ("It is this objective which the 'due process' clauses in our national and state constitutions seek to safeguard."); see also Weinstein, *supra* note 116, at 1906.

The [Federal Rules of Civil Procedure] drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly. Every claimant would get a meaningful day in court.

*Id.*

194. Weinstein, *supra* note 116, at 1906.

195. Carrington, *supra* note 44, at 2074-75.

196. *Id.* at 2077.

197. FED. R. CIV. P. 1.

the inherent tension between fairness and economy: the more meaningful a litigant's day in court, the more that day costs in time and money.<sup>198</sup>

This tension fuels the debate between the preservationists, who stress the goals of open access to the courts and accurate outcomes, and the reformers, who seek to rein in what they perceive to be a litigation explosion by restricting access to the formal litigation system and speeding up the disposition of cases.<sup>199</sup> This section will demonstrate that an unarticulated difference of opinion over what goals the civil justice system should pursue underlies the ongoing debate concerning the appropriate role for summary judgment in the California civil justice system.

### C. *The Celotex Bombshell*

*The Saga of Summary Judgment in California* begins with a trilogy of landmark cases handed down by the Supreme Court in 1986, which transformed the nature and function of summary judgment in federal court.<sup>200</sup> Prior to the trilogy, the common wisdom was that summary judgment was a disfavored and rarely granted motion in federal court,<sup>201</sup> as well as in California state courts.<sup>202</sup> The trilogy, consisting of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>203</sup> *Anderson v. Liberty Lobby, Inc.*,<sup>204</sup> and *Celotex Corp. v. Catrett*,<sup>205</sup> drastically increased the discretion of federal judges to dismiss claims on summary judgment grounds. These three decisions sent strong signals throughout the federal judiciary that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure

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198. See Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard*, 42 CLEV. ST. L. REV. 263, 263 (1994). "In an effort to provide swift justice while respecting due process, the courts have refined a tool that in theory serves this purpose superbly: summary judgment." *Id.* "Unfortunately, swift justice and due process often create conflicting interests." *Id.* at 263-64.

199. See *supra* notes 96-106 and accompanying text (discussing the ideological interests of the preservationists and the reformers).

200. See *infra* notes 212-68 (discussing effect of trilogy cases on movant and respondent's burdens).

201. See Steven A. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987). Stempel disputes the reality of this perception, stating that the trilogy made an already pro-defendant rule more pro-defendant. Stempel, *supra* note 131, at 160.

202. See *Biljac Assocs. v. First Interstate Bank*, 267 Cal. Rptr. 819, 824 (Ct. App. 1990) ("Summary judgment is a drastic measure which should be used with caution so that it does not become a substitute for trial.").

203. 475 U.S. 574 (1986).

204. 477 U.S. 242 (1986).

205. 477 U.S. 317 (1986).

the just, speedy and inexpensive determination of every action.<sup>206</sup> The trilogy enhanced the utility of summary judgment as a tool in the hands of defendants to dismiss claims, and in the hands of courts to manage crowded dockets.<sup>207</sup>

California felt the trilogy's shockwaves strongly. "Shockwaves" refers to the response of the bench, the bar, the legislature, and organized interest groups in California to the *Celotex* bombshell,<sup>208</sup> and the implications of that response for California's legislative primacy rulemaking process.

This Article chronicles the struggle between two opposing forces triggered by the trilogy: those who profess to want the application of California summary judgment standard to mirror the post-trilogy federal summary judgment standard, and those who do not. Those in support of the federal approach include the defense bar, Republicans, who won control of the California Assembly in early 1996, and some judges, including the Judicial Council.<sup>209</sup> Those in opposition include trial lawyers, some judges, and the Democrats, who retained control of the California Senate following the 1996 election.

One casualty of this struggle, as it has played out in practice commentaries, the legislature and the courts, is a clear and precise understanding

206. *Id.* at 327 (quoting FED. R. CIV. P. 1).

207. See Stempel, *supra* note 131, at 160-62; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 93 (1990); William Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213, 228 (1987) ("Summary judgment procedure is a means for cutting rapidly to the core issues of litigation.").

208. The "*Celotex* bombshell" is a shorthand way to describe the trilogy of cases of which *Celotex* was only one. This Article will shortly criticize this practice of loosely invoking the case name *Celotex* on the grounds that it has engendered much confusion in the law of summary judgment in California. See *infra* Parts III.D.2-F.

209. Prior to *Celotex*, there were calls for a more liberal summary judgment rule. See Stuart R. Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419 (1985). In 1985, Judge Pollak, who presided over the Law and Motion Department of the San Francisco Superior Court from August 1982 to July 1984, criticized the *Adickes* case and proposed relaxing the movant's burden placed on a moving defendant. *Id.* at 429. Pollak proposed allowing a defendant simply to "assert" the nonexistence of a fact material to the plaintiff's case and support that assertion with a declaration by the defendant's counsel "stating that diligent inquiry has disclosed no competent evidence of such fact and that the declarant believes that no such competent evidence exists." *Id.* This proposal would have gone further than *Celotex* by making it easier for moving defendants to force plaintiffs to undergo the burden of putting their trial cases together earlier than they ordinarily would.

of each of the cases of the trilogy and the propositions for which each case stands. Another casualty has been a clear and uniform definition of the standard for granting summary judgment in California.

Traditionally, the pretrial motion for summary judgment serves to prevent cases from proceeding to trial when the moving party persuades the court that there is no need for a trial, based upon the apparent lack of evidence creating a genuine factual dispute needed to justify the commencement of trial.<sup>210</sup> Rule 56, the federal summary judgment rule, permits the court to grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>211</sup>

### 1. The Effect of *Celotex* on the Movant's Burden

The *Celotex* decision strengthened the utility of summary judgment as a defendant's tool to dismiss claims by relaxing the requirements of the movant's burden.<sup>212</sup> The movant's burden is the burden of the party moving for summary judgment to produce evidence that demonstrates the moving party's right to summary judgment by showing that there is "no genuine issue as to any material fact."<sup>213</sup> The movant can attempt to meet this burden by using "paper evidence" in the form of depositions, answers to interrogatories, admissions (in the pleadings or in response to a Rule 36 Request for Admissions)<sup>214</sup> and affidavits, if any.<sup>215</sup>

The consequence of a moving party's failure to meet its burden is denial of the summary judgment motion, even if the responding party fails to produce any evidence of its own in opposition to the motion. In other words, the burden does not shift to the opposing party to show the existence of a genuine issue on the material fact that is the subject of the motion unless and until the court first finds that the movant's burden has been satisfied.

In a sense, therefore, the movant's burden is analogous to the dues that a moving party must pay before it can force the opposing party to produce evidence to show the existence of a genuine issue as to a material fact. Its function is to protect the opposing party who may have a

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210. Stempel, *supra* note 131, at 139-40.

211. FED. R. CIV. P. 56(c).

212. For an illuminating treatment of the effects of *Celotex* on the movant's burden, and of *Liberty Lobby* and *Matsushita* on the respondent's burden, see generally Issacharoff & Loewenstein, *supra* note 207.

213. FED. R. CIV. P. 56(c).

214. FED. R. CIV. P. 36.

215. FED. R. CIV. P. 56(c).

meritorious case from harassment by having to respond to unsupported motions. In the type of defendant's motion involved in *Celotex*, the shifting of the burden to the responding plaintiff would force it to assemble and reveal to the defendant its trial case, often substantially earlier than it would in the normal course of trial preparation.

The motion that was the subject of the Court's holding in *Celotex* was a defensive summary judgment motion in which the "material fact," as to which the moving defendant contended there was "no genuine issue," was an essential element of the plaintiff's case<sup>216</sup> and therefore at trial, the plaintiff would have the burden of production to prove up that fact.<sup>217</sup> In a defensive summary judgment motion, the moving defendant contends that the responding plaintiff cannot meet its burden of production at trial on an essential element of its case.<sup>218</sup>

In *Celotex*, the plaintiff, Mrs. Catrett, brought a wrongful death suit against several manufacturers of asbestos claiming that the proximate cause of her husband's death was his exposure to asbestos on the job.<sup>219</sup> Mrs. Catrett sued several manufacturers of asbestos, including the Celotex Corporation.<sup>220</sup> After a year of discovery, Celotex moved for summary judgment, contending that there was no genuine issue as to the material fact of causation, i.e., that the decedent had been exposed to Celotex-manufactured asbestos.<sup>221</sup> In support of its movant's burden, Celotex submitted the plaintiff's factually devoid answer to Celotex's interrogatory, which asked the plaintiff to identify her causation witnesses.<sup>222</sup> In response to this interrogatory, Mrs. Catrett named no witnesses to her husband's exposure to Celotex-manufactured asbestos.<sup>223</sup>

The trial court granted Celotex's summary judgment motion.<sup>224</sup> The court of appeals reversed, agreeing with the plaintiff that Celotex had not met its movant's burden, based on the court's interpretation of the Supreme Court's 1970 opinion in *Adickes v. S.H. Kress & Co.*,<sup>225</sup> that a moving defendant must conclusively negate an essential element of the

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216. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 319-20.

222. *Id.* at 320.

223. *Id.*

224. *Id.*

225. 398 U.S. 144 (1970).



plaintiff's case with affirmative evidence of its own.<sup>226</sup> The plaintiff's factually devoid interrogatory answers merely showed that the plaintiff had not identified any evidence of causation with which to go forward at trial. Because the court of appeals held that Celotex had not met its movant's burden, the burden did not shift to the plaintiff and, therefore, the court did not address whether the plaintiff's response was sufficient to show the existence of a genuine issue as to causation.<sup>227</sup>

The Supreme Court reversed the court of appeals, holding that the plaintiff's factually devoid interrogatory answers were sufficient to satisfy the movant's burden by "showing"—that is, pointing out to the district court—that there [was] an absence of evidence [on the material issue of causation.]”<sup>228</sup> The Court remanded the case to the court of appeals to determine whether Mrs. Catrett had satisfied her respondent's burden.<sup>229</sup> For the first time in the history of Rule 56, the Supreme Court, in this trilogy of decisions, equated summary judgment, a pre-trial motion, with the directed verdict trial motion,<sup>230</sup> which is made after the plaintiff has had the opportunity to develop its case at trial, including testimony by live witnesses.<sup>231</sup> Based upon the Supreme Court's holding in *Liberty Lobby*<sup>232</sup> that the standard for granting a summary judgment motion should mirror<sup>233</sup> that for granting a directed verdict motion, the Court in *Celotex* reasoned that the burden of production on the moving defendant for summary judgment should be no greater than the burden on that defendant would be if it moved for a directed verdict after the plaintiff's presentation of its case in chief at trial.<sup>234</sup> Because the latter motion requires the defendant to do no more than point to evidence that has already been presented by the plaintiff and show that it is insuffi-

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226. *Celotex*, 477 U.S. at 323. When the defendant satisfies its movant's burden, the burden on the responding plaintiff to show the existence of a genuine issue (i.e., to preview its case) is triggered. It was widely perceived that *Adickes* enabled a plaintiff to force a defendant to endure the time and expense of a needless trial even though the plaintiff had no case.

227. *Id.* at 321-22.

228. *Id.* at 325.

229. *Id.* at 328.

230. *Id.* at 323. The equating of summary judgment and directed verdict motions was based upon the Supreme Court's opinions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), decided during the same term as *Celotex*. *Celotex*, 477 U.S. at 323.

231. Note that this result has changed under amended Rule 50 which now permits the opposing party to move for a judgment as a matter of law after the opposing party has been fully heard with respect to the element which is the focus of the motion. FED. R. CIV. P. 50.

232. 477 U.S. at 250.

233. *Id.*

234. *Celotex*, 477 U.S. at 323.

cient to support a reasonable jury verdict for the plaintiff,<sup>235</sup> the defendant on summary judgment should be required to do no more. The moving defendant should not have to submit its own affirmative evidence to negate conclusively an element of the plaintiff's case, as was thought to have been the standard under *Adickes*.<sup>236</sup> Of course, because summary judgment is a pretrial motion,<sup>237</sup> the plaintiff has not yet put on its trial case. Therefore, the moving defendant still has a burden of production to demonstrate on paper that the plaintiff would not have sufficient evidence at trial to satisfy its burden of production and withstand a directed verdict motion.<sup>238</sup>

The Supreme Court was careful to make clear that it was not eliminating the movant's burden; the moving defendant still had the initial responsibility to demonstrate to the court, through discovery materials, admissions and affidavits, that the plaintiff would not have sufficient evidence to present at trial to create a case for the jury.<sup>239</sup> The Court failed, however, to provide sufficient guidance to help the district and appellate courts determine how this redefined movant's burden will work on a practical level. For example, how does the movant's burden tie into discovery? May a moving defendant support its motion by simply declaring, or pointing out to the court, that there is nothing in the record to support the plaintiff's case? Should courts require moving defendants to

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235. FED. R. CIV. P. 50.

236. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); see *supra* note 209 and accompanying text.

237. FED. R. CIV. P. 56.

238. *Adickes*, 398 U.S. at 157.

239. *Celotex*, 477 U.S. at 323. The Court stated:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which it believes demonstrate the absence of a genuine issue of material fact.

*Id.* (quoting FED. R. CIV. P. 56(c)).

Therefore, although the Court does not require the moving defendant to submit affirmative evidence, such as affidavits, to support the motion, it does require the movant to affirmatively demonstrate its right to summary judgment. *Id.*

conduct some discovery into the plaintiff's case to show affirmatively an absence of evidence?<sup>240</sup>

Advocates of the *Celotex* approach in California have often overlooked the fact that the plaintiff's case in *Celotex* was *not* frivolous or meritless.<sup>241</sup> As a result of a prior summary judgment motion, the plain-

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240. Some commentators have intimated that the movant's burden on summary judgment under *Celotex* is simply to point out the absence of evidence for an essential element of the plaintiff's case, a light burden which involves something less than affirmatively demonstrating through discovery materials, pleadings, admissions, and affidavits the absence of a genuine issue. See Childress, *supra* note 201, at 191 ("You [the moving defendant] suffice if you point out a failure of genuine dispute, though of course the best practice is to support your motion as factually as possible with record materials (e.g., depositions, answers to interrogatories, documents with record page cites)."); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988).

"[A] party who moves for summary judgment, unless he or she must bear the burden of proof at trial, should need to do no more than demand that the opposing party establish that it can meet its burden of production if the case is permitted to go to trial." *Id.* at 779; see also Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 55 (1988).

Much of the confusion surrounding California summary judgment in the aftermath of *Celotex* has centered on the movant's burden. The view that the moving defendant need only point out an absence of evidence in the plaintiff's case has its advocates in California summary judgment practice and its opponents. After the Court decided *Celotex* in 1986, pro-*Celotex* practice commentaries often stated, simplistically and misleadingly, that "[s]ummary judgment proof now follows the burden of proof at trial." Briane Nelson Mitchell, *Summary Judgment: A Solution to Court Congestion?*, L.A. LAW., Dec. 1990, at 29, 32. Such statements have created the impression that *Celotex* merely requires the defendant to point out to the court the absence of evidence, with no affirmative burden to assemble a prima facie case for summary judgment. After the California Court of Appeal for the Second Appellate District decided *Union Bank*, courts of appeal have split over this issue. See *infra* notes 415-64 and accompanying text (discussing the aftermath of the *Union Bank* decision).

The view that the moving defendant should be able to shift the burden of production by merely pointing out the absence of evidence in the plaintiff's case has been advocated even prior to *Celotex*. In his January 1985 article, Judge Pollak acknowledged that such a "shift in the burden of [going] forward with evidence to the opposing party could be used to harass one's adversary" by enabling defendants to "flush out the opponent's case more quickly and effectively than extended discovery." Pollak, *supra* note 209, at 428. However, Judge Pollak's proposed method to deter bad faith summary judgment motions was merely to require counsel for the moving party, "as a condition to shifting the burden of producing evidence, [to] submit a sworn statement that he or she believes there is no competent evidence of the fact in question." *Id.* at 429. Under Judge Pollak's proposal, the declaration of counsel for the movant need only affirm that "diligent inquiry has disclosed no competent evidence of such [material] fact and that [counsel] believes that no such competent evidence exists." *Id.* This proposal went beyond *Celotex* by relieving the moving defendant of the burden of assembling and submitting documentary support to demonstrate affirmatively the absence of sufficient evidence to support an essential element of the plaintiff's case.

241. *Catrett v. Johns-Manville Sales Corp. (Celotex II)*, 756 F.2d 181, 183-84 (D.C.

tiff had placed in the record a letter from her husband's supervisor, Mr. Hoff, which indicated that the decedent had been exposed to Celotex-manufactured asbestos.<sup>242</sup> Justice Rehnquist's majority opinion completely ignored this fact.<sup>243</sup> Justice Brennan's dissent, joined by Chief Justice Burger and Justice Blackmun, while agreeing in principle with the movant's burden standard announced by the majority, did not believe that Celotex had done enough to satisfy that standard.<sup>244</sup> Because Celotex knew of the contents of Mr. Hoff's letter, and Mrs. Catrett had earlier indicated her intent to call Mr. Hoff as a trial witness, the dissent argued that Celotex had the initial burden to depose Mr. Hoff to negate the possibility that he could offer relevant testimony on causation at trial sufficient to satisfy Mrs. Catrett's burden of production.<sup>245</sup>

California case law interpreted the state's summary judgment statute<sup>246</sup> consistently with the *Adickes* approach to the movant's burden in defensive summary judgment motions, and held fast to this restrictive view even after *Celotex*.<sup>247</sup> The California approach changed with the Second Appellate District's controversial *Union Bank* decision, which clouded the issue.<sup>248</sup>

Cir. 1985); see also *Celotex*, 477 U.S. at 335 (Brennan, J., dissenting).

242. *Celotex*, 477 U.S. at 320.

243. See Nelken, *supra* note 240, at 55.

[T]he majority misread the record on appeal by ignoring the fact that Celotex had made not one but two summary judgment motions. Indeed, the plaintiff's evidence of exposure was already in the record when the defendant's second motion, the one before the Court, was made. Consequently, in its eagerness to announce a new standard for the moving party's initial burden, the majority reached the wrong result on the facts of the case, even under that standard.

*Id.*

244. *Celotex*, 477 U.S. at 334-37 (Brennan, J., dissenting).

245. *Id.* at 335-37 (Brennan, J., dissenting). Nelken criticizes *Celotex* on the grounds that this flawed opinion is the consequence of the Supreme Court's determination to reinterpret Rule 56 and the choice of a poor vehicle for doing so. Nelken, *supra* note 240, at 56. Professor Stempel argues that the Supreme Court, in the trilogy, circumvented the amendment process prescribed by Congress in the REA and, in essence, amended Rule 56 itself. Stempel, *supra* note 131, at 162, 167.

246. § 437c.

247. See, e.g., *Biljac Assocs. v. First Interstate Bank*, 267 Cal. Rptr. 819 (Ct. App. 1990).

248. *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

California case law also expressed the view that summary judgment was a disfavored procedural device to be granted sparingly, rooted in concern for granting plaintiffs their day in court.<sup>249</sup> Prior to *Union Bank* there was a common perception among lawyers that a defendant could not win summary judgment motions, even where the plaintiff had no case to offer at trial, because the burden to negate an essential element of the plaintiff's case was too difficult to meet in most situations.<sup>250</sup>

## 2. The Effect of *Matsushita* and *Liberty Lobby* on the Respondent's Burden

By lowering the movant's burden, *Celotex* made it easier for the moving party to shift the burden to the responding party to show, through paper evidence, the existence of a genuine issue in order to defeat the motion for summary judgment.<sup>251</sup> *Matsushita*<sup>252</sup> and *Liberty Lobby*<sup>253</sup> further strengthened summary judgment as a defensive tool by imposing a heavier respondent's burden on the nonmoving party to defeat summary judgment, once that burden shifted.<sup>254</sup>

Prior to these two decisions, the burden on the plaintiff to defeat a summary judgment motion and preserve its right to reach the trial stage was lighter than the burden on the plaintiff to defeat a directed verdict motion and reach the jury.<sup>255</sup> On summary judgment, "most courts confined their role to merely ascertaining whether the record showed a nonfrivolous fact existence or fact interpretation dispute."<sup>256</sup> However, once the plaintiff presents its case at trial, the trial court has wide latitude to evaluate the persuasiveness of the plaintiff's case to determine whether there is sufficient evidence to support a rational jury verdict in the plaintiff's favor.<sup>257</sup> This distinction between summary judgment and

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249. See *Biljac Assocs.*, 267 Cal. Rptr. at 824.

250. See D. HERR ET AL., MOTION PRACTICE § 16.1.10 (1985) (asserting that precedents holding that summary judgment should be granted rarely are in error and courts should grant summary judgment more often).

251. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

252. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

253. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

254. Lawrence W. Pierce, *Summary Judgment: A Favored Means of Resolving Disputes*, 53 BROOK. L. REV. 279, 286-87 (1987) (arguing that *Liberty Lobby*, *Celotex*, and *Matsushita* merely enhance the already receptive attitude of the Second Circuit toward the disposition of certain cases through summary judgment motions).

255. *Id.*

256. Stempel, *supra* note 131, at 115. See, e.g., *Paul E. Hawkinson Co. v. Dennis*, 166 F.2d 61, 63 (5th Cir. 1948) (holding that summary judgment is not proper when conflicting inferences can be drawn).

257. Stempel, *supra* note 131, at 108 (asserting that in equating summary judgment

directed verdict radically changed when the Supreme Court, in *Liberty Lobby*, equated summary judgment with a directed verdict by holding "that the standard for granting summary judgment mirrors the standard for a directed verdict."<sup>258</sup>

The Supreme Court, in *Liberty Lobby*,<sup>259</sup> declared:

[The] "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted."<sup>260</sup>

Therefore, according to *Liberty Lobby*, summary judgment should be granted where the plaintiff's evidence would be insufficient to support a reasonable jury verdict for the plaintiff, i.e., to withstand a directed verdict motion.<sup>261</sup> More specifically, the Court stated that the plaintiff's evidence would not be sufficient to withstand a summary judgment motion if it were "merely colorable . . . or [was] not significantly probative."<sup>262</sup>

There were two dissenting opinions in *Liberty Lobby*, one by Justice Brennan and the other by Justice Rehnquist joined by Chief Justice Burger. Justice Brennan called the majority rule a "brand new procedure,"

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and directed verdict, the Court ignored the intent of Rule 56, expanding too greatly the power of the bench, and removing too many disputes from active adjudication).

258. *Liberty Lobby*, 477 U.S. at 250.

259. In *Liberty Lobby*, the plaintiffs Willis Carto, a conservative publisher, and Liberty Lobby, Inc., which Carto headed, brought a libel suit against Jack Anderson, the publisher of *Investigator*, the magazine's president and chief executive officer, and the magazine itself. *Id.* at 244-45. The plaintiffs based their libel action upon several articles about Carto which appeared in *Investigator*. *Id.* at 245. The defendants moved for summary judgment, arguing that, because the plaintiffs were limited-purpose public figures under *New York Times v. Sullivan*, 376 U.S. 967 (1964), the plaintiffs were required to prove by clear and convincing evidence that the defendants had published the articles with actual malice. *Liberty Lobby*, 477 U.S. at 245. The trial court granted summary judgment, finding the plaintiffs' evidence insufficient as a matter of law to prove actual malice. *Id.* at 246. The Court of Appeals for the District of Columbia reversed, finding undisputed facts from which a jury could infer reckless disregard for the truth and, consequently, actual malice. *Id.* at 246-47. The Supreme Court reversed and remanded on the grounds that the lower appellate court should have applied the "clear and convincing evidence" standard in determining whether plaintiffs' evidence of actual malice was sufficient to withstand the summary judgment motion. *Id.* at 247.

260. *Liberty Lobby*, 477 U.S. at 251 (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983)).

261. *Id.* at 251-52.

262. *Id.* at 249-50.

which will “transform what is meant to provide an expedited ‘summary’ procedure into a full-blown paper trial on the merits.”<sup>263</sup> He found it impossible “to square the [majority opinion’s] direction that the judge ‘is not himself to weigh the evidence’ with the direction that the judge also bear in mind the ‘quantum’ of proof required and consider whether the evidence is of sufficient ‘caliber or quantity’ to meet that ‘quantum.’”<sup>264</sup>

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, an antitrust case in which a group of American electronics manufacturers alleged that certain Japanese companies had conspired to sell their products below marginal cost, the Supreme Court, in a five-to-four decision, reversed the court of appeals and upheld the district court’s grant of summary judgment against the plaintiffs.<sup>265</sup> The Court based its decision on its conclusion that the plaintiffs’ charge of conspiracy was “implausible.”<sup>266</sup>

None of the trilogy cases were “no evidence” cases. On the contrary, in *Liberty Lobby* and *Matsushita*, the court of appeals and a significant minority of the Supreme Court believed that the plaintiffs’ cases were sufficient to warrant a trial.<sup>267</sup> In *Celotex*, the majority opinion overlooked the record in that Mrs. Catrett had a potential causation witness, and thus established a factual dispute. The Supreme Court had chosen the wrong case as a vehicle for redefining the movant’s burden in defensive summary judgment motions.<sup>268</sup>

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263. *Id.* at 266-67 (Brennan, J., dissenting).

264. *Id.* at 266 (Brennan, J., dissenting).

265. 475 U.S. 574, 576-78 (1986).

266. *Id.* at 587, 596. The strongly worded dissent by Justice White, joined by Justices Brennan, Blackmun, and Stevens, accused the majority of suggesting that a judge “hearing a defendant’s motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff,” which would be “overturning settled law.” *Id.* at 600-01 (White, J., dissenting). Justice Brennan’s dissent also criticized the majority for “prefer[ring] its own economic theorizing to [plaintiff’s expert]” and depriving the trier of fact of the opportunity to evaluate the expert’s testimony. *Id.* at 603 (Brennan, J., dissenting).

267. *Celotex Corp. v. Catrett*, 477 U.S. 317, 336 (1986) (Brennan, J., dissenting).

268. See *supra* note 245.

#### D. *The 1992 and 1993 Amendments to the Summary Judgment Statute*

##### 1. A Textbook Case of Confusing "Patchwork Amendments"<sup>269</sup>

Criticism over the confused state of summary judgment law in California is a time-honored tradition, as is the call for summary judgment reform.<sup>270</sup> While some commentators have cautioned against too much legislative tinkering with the summary judgment statute,<sup>271</sup> the legislature has repeatedly amended the statute in response to scholarly critiques over summary judgment.<sup>272</sup>

Since 1933, the legislature has amended the summary judgment statute on seventeen occasions.<sup>273</sup> As a consequence of legislative tinkering over the years with section 437c of the California Code of Civil Procedure, the summary judgment statute has mushroomed in detail and complexity.<sup>274</sup> Through "piece-meal amendment by successive legislatures,"<sup>275</sup> the text of the statute has grown from roughly 637 words in the 1971 version, described by one writer as "relatively brief," to approximately 2466 words contained in the current statute, an almost four-fold increase.<sup>276</sup> By comparison, the text of Rule 56, the federal summary judgment statute, is relatively terse, containing the same volume of words as the 1971 version of section 437c, and has been amended only three times since its original promulgation in 1938.

As a consequence of this succession of piecemeal amendments, the current summary judgment statute is bewildering in its complexity and disorganization.<sup>277</sup> In 1989, a former Shasta County Superior Court

269. Chief Justice Phil Gibson used the phrase "patchwork amendments" in criticizing code procedure by legislative enactment. Gibson, *supra* note 59, at 332.

270. See Pollak, *supra* note 209, at 419 n.2.

271. See generally Leon T. David, *The Summary Judgment in California: The Case for Judicial Reform*, 25 HASTINGS L.J. 119, 121 (1973); Ernest J. Zack, *California Summary Judgment: The Need for Legislative Reform*, 59 CAL. L. REV. 439, 473 (1971).

272. Pollak, *supra* note 209, at 420.

273. See § 437c. This code section was amended in 1937, 1939, 1951, 1953, 1957, 1965, 1971, 1976, 1978, 1980, 1982, 1983, 1986, 1989, 1990, 1992, and 1993. *Id.*

274. *Id.*

275. See Kleps, *supra* note 40, at 23. These are the words of Ralph N. Kleps, the first Director of the Administrative Office of the Courts, written in 1942, complaining about legislative rulemaking.

276. See § 437c.

277. See *id.*; Pollak, *supra* note 209, at 419 n.2.



judge characterized California summary judgment procedure as "clumsy, mastodonic, and overly complex."<sup>278</sup> A review of section 437c, set forth in Appendix A, reveals the degree to which the statute micromanages the judge in the minutest detail.<sup>279</sup> The arrangement of the subsections is disorganized, alternating back and forth between summary judgment and summary adjudication.<sup>280</sup>

More specifically, the drafting defects in the statute have caused particular confusion in defining the movant and respondent's burden in a *defensive* summary judgment motion and the standard to be applied by the court in deciding whether to grant the motion.<sup>281</sup> The 1992 amendment to section 437c revised subsection (n) to define, for the first time, what the moving and responding parties must show to satisfy their respective burdens.<sup>282</sup> The 1993 amendment moved the text of subsection

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278. Paul D. Freeman, *Summary Judgment: An Illusory Option?*, CAL. LAW., Dec. 1989, at 63, 65 (quoting Clyde Small, a Redding, California, attorney).

279. For example, section 437c(g) reads:

Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

§ 437c(g).

280. The distinction between summary judgment and summary adjudication as used in section 437c is that the grant of summary judgment results in a final judgment, which terminates the entire action or lawsuit, whereas an order of summary adjudication only disposes of one or more, but fewer than all, causes of action within an action. § 437c. The subsections of section 437c oscillate between summary judgment and summary adjudication as follows: Subsections (a) through (e) address summary judgment; subsection (f) deals with summary adjudication; subsections (g) through (l) return to summary judgment; subsection (m) swings back to summary adjudication; and, finally, subsections (n) and (o) apply to both motions. *Id.*

281. *Id.*

282. After the 1992 amendment (Assembly Bill 2616), the text of section 437c(n) read:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action.

(n) to subsection (o) where it currently remains.<sup>283</sup> This amendment also added language to subsection (o) which requires a party responding to a summary judgment motion to rely on specific facts, and not on the pleadings, to show the existence of a triable issue.<sup>284</sup> Assembly Bill 498 did not, however, purport to affect the movant's burden, only the *respondent's* burden.

By peppering the summary judgment statute with a variety of ambiguous terms, the legislature has compounded the confusion surrounding the movant's burden, which has taken center stage since *Celotex*. Federal Rule of Civil Procedure 56 uses a *single* legal standard—"no genuine

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action.

§ 437c(n).

283. See § 437c.

284. The current text of section 437c(o), including the 1992 and 1993 amendments, now reads as follows:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

§ 437c(o).

issue as to any material fact"<sup>285</sup>—to define both the moving and responding parties' burden of production as well as the burden of persuasion governing the trial court's ultimate determination of the motion.<sup>286</sup> Instead of adopting the simplified, single-standard approach of the federal rule, the current text of section 437c takes the reader through a labyrinth of vague and varying standards including: "no triable issue," "has no merit," and "cannot be established."<sup>287</sup>

Subsection (a) of the current version of section 437c, as amended in 1992 and 1993, provides, *inter alia*, that a party may move for summary judgment "if it is contended that the action *has no merit*."<sup>288</sup> Subsection (c) addresses the applicable standard for granting summary judgment.<sup>289</sup> It does not employ the phrase "has no merit," but instead provides that the motion shall be granted "if all the papers submitted show that there is *no triable issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."<sup>290</sup> Subsection (n) re-

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285. FED. R. CIV. P. 56(c).

286. Rule 56's more flexible and simple approach is typical of the procedural goals of the Federal Rules' "open courts" paradigm described by Stempel. *See supra* notes 96-106 and accompanying text; *see also* Childress, *supra* note 201, at 185 (finding that "[m]ost states use a summary judgment rule whose language tracks that of federal Rule 56").

287. The California Judges Association (CJA) chided the legislature for sowing seeds of confusion in summary judgment law by dreaming up additional statutory terminology rather than simply tracking Rule 56. The Association expressed this view in a letter sent by the Association to the Chair of the Assembly Judiciary Committee dated April 26, 1993, opposing Assembly Bill 498:

CJA believes that the Legislature should use the language of the Federal Rule in further amending California's statute or leave current law intact. Otherwise, rather than allowing the courts to rely on settled interpretation of the Federal language, the Legislature will be making new law requiring fresh interpretation in an area where such diversity would not be called for, given that the author's goal is adherence to the Federal model.

Letter from Constance Dove, Executive Director, Cal. Judges Ass'n, (Apr. 26, 1993) (on file with author).

288. § 437c(a) (emphasis added). The phrase "has no merit" is a carryover from the 1990 version of section 437c(a). Section 437c(a) also authorizes a party to move for summary judgment if it is contended that there is "*no defense to the action*." *Id.* (emphasis added). This phrase "no defense to the action" is applicable only to *offensive* summary judgment motions in which the plaintiff, or cross-complainant, contends that, on each element of its claim as to which it would have the burden of production at trial, there is no genuine issue for trial. I relegate to footnotes that portion of the text of section 437c that concerns offensive summary judgment motions in order to focus on the more controversial portion of section 437c that deals with defensive summary judgment motions.

289. *Id.*

290. § 437c(c) (emphasis added). The phrase "no triable issue as to any material fact" is also a carryover from the predecessor section 437c(c). Note that this standard sounds similar, but not identical to the language "no genuine issue as to any

turns to the words "has no merit" for the purpose of defining this phrase as follows: "A cause of action has no merit if . . . One or more of the elements of the cause of action *cannot be separately established* . . . .

<sup>291</sup> Finally, in subsection (o), the legislature attempts, for the first time in the history of California summary judgment jurisprudence, to clarify the summary judgment burden of production borne by a moving plaintiff<sup>292</sup> in an offensive summary judgment motion and the burden of production borne by a moving defendant in a defensive summary judgment motion.<sup>293</sup>

Rather than defining the burden of the moving defendant as "showing that there is no triable issue as to a material fact,"<sup>294</sup> the standard for granting the motion set forth in subsection (c), subsection (o)(2) provides that the moving defendant has the burden of "showing that a cause of action *has no merit* . . . [by showing] that one or more elements of the cause of action . . . *cannot be established*."<sup>295</sup>

## 2. Sowing the Seeds of Ambiguity: The Statutory Language "Cannot Be Established"

After the enactment of the 1992 amendment, the meaning of the ambiguous phrase "cannot be established" divided commentators.<sup>296</sup> A major

material fact" in Federal Rule 56.

291. § 437c(n) (emphasis added).

292. § 437c(o)(1).

293. § 437c(o)(2).

294. Federal Rule 56 defines the movant's burden in terms of "show[ing] that there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c).

295. § 437c(o)(2) (emphasis added). Section 437c(o)(1) defines the movant's burden in offensive summary judgment and summary adjudication motions: "A plaintiff or cross-complainant has met his or her burden of showing that there is *no defense to a cause of action* if that party has *proved each element of the cause of action* entitling the party to judgment on that cause of action." § 437c(o)(1) (emphasis added).

296. See *Hagen v. Hickenbottom*, 48 Cal. Rptr. 2d 197, 206 (Ct. App. 1995) ("There was initial debate [after enactment of the 1992 amendment] as to whether the new statutory requirement of a showing that an element 'cannot be established' effected any significant change from the preexisting requirement that the defendant 'conclusively negate' the element."). Compare, e.g., Douglas Hatchimonji, *Considering the Summary View of the Recent Change in Summary Judgment Law*, CTLA F., Mar. 1994, at 11, 13, with Kurt L. Schmalz, *Summary Judgment: A Dress Rehearsal for Trial*, 16 L.A. LAW., Sept. 1993, at 23.

Curtis E.A. Karnow, who at publication was a member of the California State Bar Standing Committee on the Administration of Justice, wrote in reference to section 437c as amended in 1992:

controversy erupted between pro-*Celotex* and anti-*Celotex* factions over the legislative intent behind this language, each side reading into "cannot be established" the meaning that supported its view of the role of summary judgment.<sup>297</sup> As a consequence, instead of achieving the legislature's purpose of clarifying the movant's burden, the insertion of this language into section 437c(o)(2) has served to generate confusion as to what a moving defendant must do to satisfy its burden of production in a defensive summary judgment motion.

The legislature sowed the seeds of this confusion over the movant's burden through poor drafting choices. Inaccurate references to *Celotex* in the legislative history of the 1992 and 1993 amendments fertilized the ground. Confusion over the movant's burden blossomed in the *Union*

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[T]he statute remains opaque. It still places the burden of showing that a cause of action has "no merit" on the defendant moving for summary judgment . . . . While many interpretations of the new language are conceivable, it probably will have the effect of continuing the imposition on moving defendants to demonstrate a negative, that there is no evidence of an essential element.

Curtis E.A. Karnow, *Archeology of Error: Tracing California's Summary Judgment Rule*, 24 PAC. L.J. 1845, 1883-84 (1993) (emphasis added). Compare *id.* with ROBERT I. WEIL & IRA A. BROWN, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 10.237 (1996) ("The 1992 amendments represent a significant departure from former law. Legislative history shows it was the legislature's intent to adopt the federal standards governing burden of proof on summary judgment motions as expressed in *Celotex*."). See Michael Paul Thomas, *California Has a New Burden of Proof for Summary Judgment*, L.A. DAILY J., July 19, 1993, at 7:

We may continue to believe the time has come for California to fully adopt the federal standard on motions for summary judgment. However, it is not obvious that the California Legislature intended to do so with the passage of AB 2616. Judges Weil and Brown clearly believe otherwise. They may be correct. *Their analysis may also become a self-fulfilling prophecy, since the Weil & Brown practice guide has been cited by California appellate courts as a "leading treatise."*

(emphasis added); see also Schmalz, *supra*. Schmalz predicted that the 1992 amendment made summary judgment "subject to essentially the same liberal standard which the U.S. Supreme Court adopted for the federal courts in the *Celotex/Anderson/Matsushita* trilogy." *Id.* at 23. At the same time, Schmalz conceded that "[w]hether the California judiciary embraces the summary judgment procedure as the federal courts did in 1986 after *Celotex/Anderson/Matsushita* is subject to speculation." *Id.*; see Robin Brandes-Gibbs & James B. Morell, *Developments on the Burden of Proof in Summary Judgment*, L.A. DAILY J., May 3, 1994, at 7 ("California has adopted the *Celotex* standard only with respect to the burden of proof for a moving plaintiff; and the 1992 and 1993 amendments otherwise codify standards for summary judgment under existing California law.").

297. See *infra* note 309-13 and accompanying text.

*Bank* decision.<sup>298</sup> This Part will first trace, in three phases, the legislative roots of the phrase "cannot be established."

*a. Phase 1*

Phase 1 begins with the phrase "has no merit." Prior to the 1990 amendments to section 437c, this phrase appeared only in subsection (a), which provided: "Any party may move for summary judgment . . . if it is contended that the action *has no merit*."<sup>299</sup> Prior to the 1990 amendments, subsection (f), which sets forth when a party can move for summary adjudication, contained no parallel provision to indicate what the movant must contend in order to move for summary adjudication,<sup>300</sup> even though the two motions are essentially the same.<sup>301</sup>

*b. Phase 2*

The 1990 amendments to section 437c added the phrase "has no merit" to subsection (f),<sup>302</sup> thereby making it parallel to subsection (a). The legislature, however, took an additional step. In defining when a cause of action "has no merit" for purposes of a summary adjudication motion under subsection (f), the legislature added the words "if . . . one or more of the elements of the cause of action . . . *cannot be established*."<sup>303</sup> Interestingly, the legislature chose not to add "cannot be established" to define "has no merit" for purposes of subsection (a) pertaining to summary judgment.<sup>304</sup>

298. *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

299. § 437c(a) (emphasis added).

300. § 437c(f).

301. The only difference between summary judgment and summary adjudication is that "summary judgment terminates the action between the parties and results in an immediate, appealable judgment," whereas "[s]ummary adjudication orders do *not* terminate the action." 3 WEIL & BROWN, *supra* note 296, § 10:34. "The summary adjudication simply eliminates the need to prove or disprove a particular claim or defense when the case comes to trial." *Id.*

302. S.B. 2594, 1990 Reg. Sess. (Cal. 1990).

303. § 437c(o)(2) (emphasis added).

304. This asymmetry was corrected two years later in the 1992 amendment to section 437c that purported, for the first time, to address specifically the issue of the movant's burden. A.B. 2616, 1991-1992 Reg. Sess. (Cal. 1992).

c. Phase 3

In 1992, the legislature apparently corrected the drafting error made two years earlier. The 1992 amendments to section 437c deleted the phrase "cannot be established" from subsection (f) and inserted this phrase in subsection (n)<sup>305</sup> to define when a cause of action "has no merit" in motions for both summary adjudication and summary judgment.<sup>306</sup>

When the words "cannot be established" made their debut in the 1990 amendment to section 437c(f), there was no contention that these words manifested a legislative intent to change the standard for determining summary adjudication motions.<sup>307</sup> In 1992, the legislature took this same phrase and simply expanded its application to include summary judgment as well as summary adjudication in subsection (n)(1), thereby making the movant's burden on summary judgment and summary adjudication consistent.<sup>308</sup> Therefore, on the face of these amendments, there is no apparent legislative intent behind the language "cannot be established" to change summary judgment standards. If there were such an intent, the legislature made another poor choice of words to effect that intent.

The following analysis of the *Union Bank* opinion challenges the court's reliance on ambiguous and contradictory legislative history to interpret "cannot be established" as manifesting a legislative intent to adopt, or move toward, the *Celotex* definition of the moving defendant's burden of production in a motion for summary judgment.

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305. Section 437c(n) became the current section 437c(o) as a consequence of the 1993 amendment. A.B. 498, 1993-1994 Reg. Sess. (Cal. 1993).

306. A.B. 2616, 1991-1992 Reg. Sess. (Cal. 1992).

307. See, e.g., *Brantley v. Pisaro*, 50 Cal. Rptr. 2d 431 (Ct. App. 1996):

[T]he phrase 'cannot be established' was not new to section 437c in 1992. It first appeared in 1990, and was then placed in subdivision (f), which dealt only with motions for summary adjudication. . . . Other than limit the issues for which summary adjudication was available, the 1990 legislation was not intended to change existing summary judgment law.

*Id.* at 435 (citing *City of Emoryville v. Superior Court*, 2 Cal. Rptr. 2d 826 (Ct. App. 1991)).

One commentator who advocated the *Celotex* approach proposed accomplishing the transformation of the movant's burden from the "restrictive approach" to the liberal federal approach, not by legislative action, but by judicial reinterpretation of the "cannot be established" language in section 437c(f). William J. Dowling, *Is There Any Hope for the Celotex Rule on Summary Judgment Motions in California?*, 26 U.S.F. L. REV. 493 (1992). "The very terms of this amendment seem to contemplate summary judgment for lack of evidence on or inability to substantiate some element of a pleaded claim." *Id.* at 510.

308. See *supra* notes 303-05 and accompanying text.

*E. Union Bank: The Confusion Caused by Bad Statutory Law is  
Compounded by Bad Case Law*

*Celotex* advocates heralded the Second District Court of Appeal's decision in *Union Bank*<sup>309</sup> as ushering in a "new era in summary judgment practice in California."<sup>310</sup> For the first time, a California court ruled that, like the federal approach under *Celotex*, a moving defendant did not have to negate conclusively the plaintiff's case.<sup>311</sup> In *Union Bank*, the Second District Court of Appeal interpreted the phrase "cannot be established" as manifesting the intention of the legislature that "[n]ow, a moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision (o)(2)."<sup>312</sup> Many thought *Union Bank* had conclusively settled the movant's burden issue throughout California courts in favor of the *Celotex* approach.<sup>313</sup> In fact, *Union Bank* did not settle the issue,<sup>314</sup> but rather has compounded the confusion in the current law on the extent of the summary judgment burden of production on a moving defendant.

In *Union Bank*, the plaintiffs brought suit against forty co-defendants, including Union Bank, claiming fraud and conspiracy to defraud.<sup>315</sup> Union Bank moved for summary judgment in reliance on the plaintiffs' factually devoid answers to interrogatories.<sup>316</sup> Reversing the lower court's denial of the defendant's summary judgment motion, the court of appeal held that Union Bank met its burden by showing, through the deficient interrogatory answers, that the plaintiffs lacked evidence to prove Union Bank had made fraudulent representations or was involved in a conspira-

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309. *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

310. *Hunter v. Pacific Mechanical Corp.*, 44 Cal. Rptr. 2d 335, 337 (Ct. App. 1995).

311. *Union Bank*, 37 Cal. Rptr. 2d at 663.

312. *Id.* The *Union Bank* court fashioned a narrow holding, expressly declining to decide whether the Legislature had "intended to adopt the *Celotex* Corp. test." *Id.* at 661. See *infra* notes 315-18 and accompanying text.

313. See, e.g., Calvin House, *Summary Shift, State Defendants Get Benefit of Federal Standard*, L.A. DAILY J., Mar. 6, 1995, at 7. "The *Union Bank* decision should settle the debate [over whether the Legislature intended] to import the federal standard [for shifting the burden of production from movant to respondent or whether] a defendant still had to negate the plaintiff's case with evidence of his or her own." *Id.*; see also Evelio M. Grillo, *Union Bank v. Superior Court—California's Celotex*, 9 CAL. LITIGATOR 210, 211 (Fall 1995).

314. See *infra* notes 415-64 and accompanying text.

315. *Union Bank*, 37 Cal. Rptr. 2d at 654.

316. *Id.* at 665.



cy.<sup>317</sup> Conceding the ambiguity of the phrase “cannot be established,” the court reviewed and relied on the legislative history of both the 1992 and 1993 amendments of section 437c.<sup>318</sup>

1. The Court’s Use of Legislative History of  
Assembly Bill 2616—The 1992 Amendment
  - a. *Report prepared for August 18, 1992, hearing before  
the Senate Committee on the Judiciary*

The *Union Bank* decision places great weight on a committee report prepared for an August 18, 1992, hearing before the Senate Committee on the Judiciary.<sup>319</sup> The *Union Bank* decision notes that the version of Assembly Bill 2616 that first passed the State Assembly did not contain the language establishing the burden on a moving defendant that would later appear in section 437c(n)(2).<sup>320</sup> As an amendment to Assembly Bill 2616, this language was first proposed after the Assembly passed the amendment and while it was pending before the Senate Committee on the Judiciary.<sup>321</sup> The August 18, 1992, report to the Senate Judiciary Committee (August 18 Report) contains the first reference to the “cannot be established” language at issue in *Union Bank*.<sup>322</sup>

The court quoted that portion of the report which describes the manner in which the “new” subdivision (n) would distribute the burdens of proof in a summary judgment motion:

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317. *Id.* at 665.

318. *Id.* at 659. “Because there is some ambiguity as to the effect of the language ‘one or more elements of the cause of action . . . cannot be established . . .’ in the 1992 amendment which was later reenacted as section 437c, subdivision (o)(2), resort to contemporaneous legislative history materials such as committee reports is appropriate.” *Id.*

319. See *infra* notes 323-26 and accompanying text.

320. *Union Bank*, 37 Cal. Rptr. 2d at 659. The version of Assembly Bill 2616 that first passed the Assembly contained “technical” changes designed to correct, in patchwork fashion, “deficiencies and oversights resulting from the 1990 bill in this area.” REPORT TO ASSEMBLY SUBCOMM. ON ADMIN. OF JUSTICE, A.B. 2616, Reg. Sess. 1 (Cal. 1992). The report notes that the 1990 amendments to section 437c “were intended to streamline the summary judgment procedure,” but “due to drafting errors the legislation inadvertently repealed a number of provisions that gave summary adjudication orders legal effect.” *Id.* at AP-4.

321. *Union Bank*, 37 Cal. Rptr. 2d at 659-60. The fact that the significant changes to the movant’s burden were added to Assembly Bill 2616 after it had passed the Assembly demonstrates that these changes were not part of a coherent, deliberate plan to overhaul summary judgment practice; rather, the idea seems to have come as an afterthought.

322. *Id.*

It would provide that a plaintiff has met his burden of showing there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff has met that burden, the burden shifts to the defendant to show that a triable issue of one or more material facts exists in that cause of action.

A similar rule is proposed for defendants. A defendant would be deemed to have met his burden of showing that a cause of action has no merit if the party shows that one or more elements of the cause of action *cannot be established*, or that there is a complete defense to that cause of action. Once the defendant meets that burden, the burden shifts to the plaintiff to show that a triable issue of fact remains in the cause of action.<sup>323</sup>

The court omitted from its quotation the next paragraph of the August 18 Report, simply describing that paragraph as a "discuss[ion of] the plaintiff's burden under the proposed amendment."<sup>324</sup> The omitted paragraph states:

This provision is sponsored by the author's staff, who asserts that the current state rule has been criticized by a number of legal commentators. Case law currently requires a plaintiff seeking to obtain a summary judgment motion to show *both* that it has proved up on the cause of action *and* negated any applicable affirmative defenses. In comparison, a defendant can obtain a summary judgment if it negates the existence of a material element of the plaintiff's cause of action or proves up its affirmative defense.<sup>325</sup>

The court's opinion then quotes in full the concluding paragraph of the report:

The sponsor points to the federal rules as providing a more equitable standard. Under Federal Rule 56, a party moving for summary judgment is not required to support the motion with affidavits or other similar materials to negate an opponent's claim. (See *Celotex Corporation v. Catrett* (1986) 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265.) This bill would follow the federal example and require each party seeking a summary judgment to prove up its own case without having to negate claims of the opposition.<sup>326</sup>

The court did not at that point in its opinion draw any conclusions as to the meaning of the foregoing excerpts from the August 18 Report, choosing instead to withhold all commentary until completing its review of the legislative history of both Assembly Bill 2616 and Assembly Bill 498.<sup>327</sup> Only at that point did the court deduce the meaning of "cannot

323. *Id.* at 660 (emphasis added) (citations omitted).

324. *Id.*

325. IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 8 (1992) (emphasis added).

326. *Union Bank*, 37 Cal. Rptr. 2d at 660 (citation omitted) (quoting IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 9 (1992)).

327. *See id.* at 657-63 (discussing the legislative history of Assembly Bill 2616 and

be established" from the combined legislative history of both bills "[t]aken together."<sup>328</sup>

Nevertheless, the court mistakenly thought it had found some support for its holding that a moving defendant need not negate an element of the plaintiff's case in the August 18 Report's reference to *Celotex*. The court quoted the report, which stated: "This bill would follow the federal example and require each party seeking summary judgment to prove up its own case without having to negate claims of the opposition."<sup>329</sup>

When one reads the entire section of the August 18 Report dealing with subsection (n)<sup>330</sup> and other parts of the legislative history ignored by the court, it is apparent that the legislative intent was only to relax the burden of a moving plaintiff in an offensive summary judgment motion so that it matches the burden of a moving defendant in a defensive summary judgment motion. The intent was not to relax the moving defendant's burden to conform to *Celotex*.<sup>331</sup>

The August 18 Report clearly reflects the Senate Judiciary Committee's awareness that the bill's author's sole concern was to correct an inequity that existed with respect to the burden of a moving plaintiff, not a moving defendant.<sup>332</sup> In effect, California case law required a moving plaintiff to satisfy two burdens, while requiring a moving defendant to meet only one.<sup>333</sup> Not only did the plaintiff bear the burden to prove up conclusively the elements of its own cause of action, but also it bore a burden to address any affirmative defenses asserted by the defendant and to negate them.<sup>334</sup> By contrast, the moving defendant had only the burden of negating the existence of a material element of the plaintiff's cause of action.<sup>335</sup> The clear intent of subdivision (n) was to treat these two burdens more equitably by relieving the moving plaintiff of the burden of negating affirmative defenses, not to relax the moving defendant's burden to negate an essential element of the plaintiff's cause of action. This equalizing of the moving plaintiff's and moving defendant's burdens is

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Assembly Bill 498).

328. *Id.* at 663.

329. *Id.* at 660 (quoting IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess 10 (1992)).

330. § 437c(n).

331. See *infra* notes 346-64 and accompanying text.

332. See IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 9-10 (1992).

333. See *Union Bank*, 37 Cal. Rptr. 2d at 659.

334. *Id.*

335. See IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 9-10 (1992).

what the bill's author meant when he inappropriately pointed to "the federal rules as providing a *more equitable standard*."<sup>336</sup>

A report to the Assembly Subcommittee on Administration of Justice, dated May 5, 1992, confirms the foregoing interpretation of Assembly Bill 2616.<sup>337</sup> This report, which was not mentioned in *Union Bank*, stated that the California Trial Lawyers Association and the bill's author believed that "the allocation of the burden of proof on summary judgments" needed to be further examined as the bill proceeded through the legislature.<sup>338</sup> More specifically, the report recognized that "[t]he state rule for plaintiffs of all kinds in obtaining a summary judgment . . . is much more onerous than exists in the federal courts or in other states."<sup>339</sup>

It is not surprising that the California Trial Lawyers Association would seek to make it easier for plaintiffs to win summary judgment motions. They would, however, vigorously and vocally oppose any effort to relax the moving defendant's summary judgment burden.<sup>340</sup> The August 18 Report confirms that "none [of the changes to the summary judgment law proposed by A.B. 2616] appear to be controversial."<sup>341</sup> The report continues: "The proposal has been extensively circulated without any group voicing any opposition."<sup>342</sup>

Another mistake by the *Union Bank* court was to rely on the inappropriate references in the August 18 Report to Rule 56 and *Celotex* as support for the court's interpretation of subdivision (n)(2).<sup>343</sup> These references derive from the bill's sponsor, Assembly Member Steve Peace.<sup>344</sup> The record is clear that Peace believed a "modified form" of the *Celotex* rule supports the intent behind Assembly Bill 2616 to relax the burden of a moving plaintiff.<sup>345</sup> *Celotex*'s holding that a moving defendant "is not

336. *Union Bank*, 37 Cal. Rptr. 2d at 660 (emphasis added).

337. REPORT TO ASSEMBLY SUBCOMM. ON ADMIN. OF JUSTICE, A.B. 2616, Reg. Sess. 7-8 (Cal. 1992).

338. *Id.*

339. *Id.*

340. The influence of the Trial Lawyers Association on the Democrat-controlled Senate was instrumental in the demise of Assembly Bill 3113 in the Senate Judiciary Committee in August 1996. The express purpose of that bill was to conform the moving defendant's burden to *Celotex*. See *infra* notes 465-506 and accompanying text.

341. IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 9 (1992).

342. *Id.*

343. *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653, 660-61 (Ct. App. 1995).

344. *Id.* at 663 n.9.

345. Assembly Member Peace explicitly expressed this view in his September 8,

required to support the [summary judgment] motion with affidavits . . . to *negate* an opponent's claim"<sup>346</sup> does appear on the surface to provide support for the elimination in Assembly Bill 2616 of the requirement that a moving plaintiff negate any affirmative defenses. Closer analysis reveals, however, that *Celotex* does not apply to the moving plaintiff's burden in an offensive summary judgment motion.<sup>347</sup>

*Celotex's* holding that a moving defendant is not required to negate or disprove an element of the plaintiff's case makes sense only in the context of a defensive summary judgment motion.<sup>348</sup> By definition, in a defensive summary judgment motion the movant will not bear the burden of production at trial on the material fact that is the focus of the motion.<sup>349</sup> *Celotex's* rationale is that a defendant who will not have the burden at trial to negate a plaintiff's case in order to prevail on a directed verdict motion should not have that burden as a moving party on summary judgment.<sup>350</sup> Because *Liberty Lobby* held that the standard for summary judgment mirrors the standard for a directed verdict,<sup>351</sup> the Court in *Celotex* reasoned that the moving defendant need only show that the plaintiff's evidence is insufficient to support a rational jury verdict for the plaintiff.<sup>352</sup>

This rationale has no application to the burden of a moving plaintiff who has made an offensive summary judgment motion. Under federal summary judgment law, the moving plaintiff must conclusively establish every element of its claim because it has the burden of production on each element of its claim if the case proceeds to trial.<sup>353</sup> *Celotex* did nothing to change that requirement.<sup>354</sup> It would appear at first, however, that *Celotex* does support the elimination of the additional burden that

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1993, letter inserted in the Assembly Daily Journal: "AB 2616 adopted in a modified form the rule of [*Celotex*] and overrode pre-existing California law by providing that a plaintiff may obtain a summary judgment if it proves up the allegations of its complaint." CALIFORNIA LEGISLATURE, ASSEMBLY DAILY JOURNAL, REPORT TO THE GEN. ASSEMBLY OF 1993-1994 (1993).

346. IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 9 (1992) (emphasis added).

347. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

348. See *id.* at 324 (noting that "[i]n cases like the instant ones where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file") (internal quotations omitted).

349. *Id.*

350. *Id.* at 323-24.

351. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

352. *Celotex*, 477 U.S. at 323, 325.

353. FED. R. CIV. P. 56; see also *Celotex*, 477 U.S. at 324.

354. See *Celotex*, 477 U.S. at 323.

California case law placed on the moving plaintiff to negate any affirmative defenses as to which the defendant would bear the burden of production at trial.<sup>355</sup>

The problem with this logic is that Assembly Bill 2616 did not relax the moving plaintiff's burden to negate affirmative defenses; rather, it eliminated that burden.<sup>356</sup> *Celotex* did not purport to reassign burdens, and it certainly did not eliminate the summary judgment burden on a moving defendant.<sup>357</sup> Instead, *Celotex* established that a moving defendant still has an initial burden, but that it can satisfy that burden by showing an absence of evidence to support the plaintiff's case.<sup>358</sup> Hypothetically, had Assembly Bill 2616 continued to assign to the moving plaintiff the additional burden of addressing affirmative defenses, but provided that the plaintiff could meet that burden merely by showing that the defendant's evidence is insufficient to prevail at trial on its affirmative defenses, it could then be argued with some plausibility that *Celotex* supports that result. Assembly Bill 2616, however, did not merely relax this additional burden; in fact, it completely eliminated the burden because it was an inequitable second burden that had been assigned to plaintiffs only in California.<sup>359</sup>

Furthermore, the statement in the August 18 Report that the "bill would follow the federal example and require each party seeking a summary judgment to prove up its own case"<sup>360</sup> also makes no sense. In a defensive summary judgment motion, it is the plaintiff, not the moving defendant, who has a case to prove up.<sup>361</sup> Therefore, under *Celotex*, the defendant need only show that the plaintiff has no case.<sup>362</sup> By contrast, in an offensive motion, the moving plaintiff does have a case to prove up on its motion and at trial.<sup>363</sup> Thus, the sentence in the August 18 Report

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355. *Id.*

356. IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, REG. SESS. 8 (1992).

357. *See Celotex*, 477 U.S. at 324.

358. *Id.* at 325.

359. *See* REPORT TO ASSEMBLY SUBCOMM. ON ADMIN. OF JUSTICE, A.B. 2616, REG. SESS. 7-8 (1992).

360. IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, REG. SESS. 9 (1992).

361. *Celotex*, 477 U.S. at 324-25.

362. *Id.* at 325.

363. *Id.* at 324.

is more consistent with the negation approach that requires the moving defendant to disprove affirmatively a material element of the plaintiff's case.<sup>364</sup>

*b. Report prepared by the Assembly Committee of the  
Floor Coordinator*

The second piece of Assembly Bill 2616 legislative history relied upon in *Union Bank* was a report prepared by the Assembly Committee of the Floor Coordinator after Assembly Bill 2616 returned to the Assembly for concurrence in the Senate amendments.<sup>365</sup> The opinion quotes the following statements from the report, which the court characterized as "ambiguous[]":

[Assembly Bill 2616] [c]larifies the burden of proof on summary adjudication and summary judgment motions to codify state law as to the defendant's burden of proof and changes the plaintiff's burden of proof in accordance with the United States Supreme Court's decision in *Celotex Corp. v. Catrett* by:

a) Providing that a plaintiff has shown that its motion for summary judgment or summary adjudication shall be granted if the plaintiff proves up his or her cause(s) of action. Once the plaintiff has met the initial burden, the defendant has met that burden, [sic] the defendant has the burden to show that there is a triable issue of fact.

b) Providing that a defendant has shown that its motion for summary judgment or summary adjudication shall be granted if the defendant or cross defendant *negates an element of the plaintiff's cause(s) of action* or proves up its affirmative defense(s). Once the defendant has met the initial burden, the plaintiff has the burden to show that there is a triable issue of fact.<sup>366</sup>

The report is not ambiguous. The text of the report is consistent with the sense of the August 18 Report to the Senate Judiciary Committee that Assembly Bill 2616 did not purport to change the burden on the moving defendant.<sup>367</sup> The statement that Assembly Bill 2616 codifies state law as to the defendant's burden of proof means that the bill retains the existing case law requirement that the defendant negate an element of the plaintiff's cause of action.<sup>368</sup> Subparagraph (b) expressly

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364. See *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653, 661 n.8 (Ct. App. 1995).

365. *Id.* at 660-61 (citing Concurrence in Senate Amendments, A.B. 2616 (Peace)—as amended, Aug. 25, 1992).

366. *Id.* (emphasis added) (citation omitted).

367. IRWIN NOWICK & STATE BAR OF CALIFORNIA, REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. 8-9 (1992).

368. See *Union Bank*, 37 Cal. Rptr. 2d at 663 n.9 (describing letter inserted into the Assembly Daily Journal by Assembly Member Steve Peace, the author of Assembly Bill 2616, which stated that "A.B. 2616 merely codified the already existing burden of proof for defendants without change"). The *Union Bank* court did not rely on Peace's letter, but instead upon the following holding by the California Supreme

uses the very words of this case law rule: "negate[] an element of the plaintiff's cause[] of action."<sup>369</sup> The court itself was understandably critical of this report because it was inconsistent with *Union Bank's* holding. The opinion characterized the quoted language as "shrouded in some uncertainty" and noted the flaw in the reference to *Celotex* as shaping the plaintiff's burden of proof.<sup>370</sup>

## 2. The Court's Use of Legislative History of Assembly Bill 498—The 1993 Amendment

The court relied heavily on certain parts of the legislative history behind Assembly Bill 498, stating: "Whatever uncertainty may have existed after the 1992 legislation was approved by the Governor as to the continued viability of [the *Barnes v. Blue Haven Pools* rule requiring a moving defendant 'to negate the matters which the resisting party would have to prove at trial'], the purpose of Assembly Bill No. 498 is unmistakable."<sup>371</sup> Assembly Bill 498 did not change the movant's summary judgment burden; rather, the 1993 amendment affected the respondent's burden by adding the following language to section 437c(o)(1) and (2):

[The responding party] may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.<sup>372</sup>

The court's opinion stressed three components of Assembly Bill 498's legislative history: a resolution of the State Bar Conference of Delegates, accompanied by excerpts from the Advisory Committee Notes to Federal Rule of Civil Procedure 56(e),<sup>373</sup> a report prepared for a Senate Judicial

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### Court:

"In construing a statute, we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy; no guarantee can issue that those who supported his proposal shared his view of its compass."

*California Teachers Ass'n v. San Diego Community College Dist.*, 621 P.2d 856, 860 (Cal. 1981) (citations omitted) (quoting *In re Marriage of Bouquet*, 546 P.2d 1371, 1374 (Cal. 1976)).

369. *Union Bank*, 37 Cal. Rptr. 2d at 661.

370. *Id.*

371. *Id.* at 663.

372. § 437c(o)(1), (2).

373. *Union Bank*, 37 Cal. Rptr. 2d at 661-65; see also *infra* notes 376-90 and accompanying text.



ry Committee hearing held on June 29, 1993,<sup>374</sup> and a report prepared by the Office of Senate Floor Analyses.<sup>375</sup>

a. *Resolution of the State Bar Conference of Delegates*

The *Union Bank* court noted that both the Assembly and the Senate Judiciary Committees had before them a resolution of the State Bar Conference of Delegates.<sup>376</sup> The specially underlined portion of this resolution, which appeared in the legislative history but was omitted from the court's opinion, states:

When a motion for summary judgment is made and supported as provided in this section, an opposing party may not rely upon the mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a triable issue. If the opposing party does not so respond, summary judgment, if appropriate, shall be granted.<sup>377</sup>

Based upon this resolution, the court made the unqualified statement that the State Bar resolution intended to overrule *Barnes v. Blue Haven Pools*.<sup>378</sup> *Barnes*, a 1969 Second District Court of Appeal decision, held that a moving defendant, in a defensive summary judgment motion, must conclusively negate an essential element of a plaintiff's case.<sup>379</sup> With respect to the movant's burden, the *Barnes* court stated:

There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, *the moving party must generally negative the matters which the resisting party would have to prove at the trial.*<sup>380</sup>

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374. *Union Bank*, 37 Cal. Rptr. 2d at 661-65; see also *infra* notes 391-401 and accompanying text.

375. *Union Bank*, 37 Cal. Rptr. 2d at 661-65; see also *infra* notes 402-04 and accompanying text.

376. *Union Bank*, 37 Cal. Rptr. 2d at 662 (citing letter from Theresa D. Taylor, Legislative Counsel of the State Bar of California, to Assembly Member Jan Goldsmith, January 7, 1993, contained in SENATE COMMITTEE ON JUDICIARY FILE FOR A.B. NO. 498, Reg. Sess. SP 9 (1993)).

377. Resolution 5-5-90, Sponsored by State Bar Conference of Delegates, under cover letter from Theresa D. Taylor, Legislative Counsel of the State Bar of California, to Assembly Member Jan Goldsmith, January 7, 1993, contained in SENATE COMMITTEE ON JUDICIARY FILE FOR A.B. NO. 498, Reg. Sess. SP 9 (1993).

378. *Union Bank*, 37 Cal. Rptr. 2d at 662.

379. *Id.*; *Barnes v. Blue Haven Pools*, 81 Cal. Rptr. 444, 447 (Ct. App. 1969).

380. *Barnes*, 81 Cal. Rptr. at 447 (emphasis added). In *Barnes*, the plaintiff brought a personal injury suit against Blue Haven Pools, alleging that he was injured as a result of the defendant's negligent design and construction of a private swimming pool. *Id.* The defendant brought a defensive summary judgment motion to dismiss the negligence claim and supported its motion with plaintiff's factually devoid interrogatory answers. *Id.* The superior court granted the motion, but was reversed on appeal because the "defendant's presentation at the motion for summary judgment [did not]

The *Barnes* court held that the defendant had not met its stringent movant's burden and, therefore, the plaintiff had no burden to respond.<sup>381</sup>

The full text of the State Bar resolution does not support the *Union Bank* court's blanket assertion that the resolution's express purpose was to overrule *Barnes*.<sup>382</sup> The resolution's Statement of Reasons, cited by *Union Bank*, states: "The proposed amendment is derived from the last two sentences of Federal Rule of Civil Procedure 56(e) and would overrule cases such as *Barns [sic] v. Blue Haven Pools*."<sup>383</sup> The last two sentences of Rule 56(e) pertain to the respondent's burden, not the movant's burden, which was *Barnes*'s focus.<sup>384</sup> Rule 56(e) provides that when the moving party has met its burden to show that there is no genuine issue as to any material fact, so that the burden shifts to the responding party to show the existence of a genuine issue, the respondent "*may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial.*"<sup>385</sup>

It is apparent that the purpose of the resolution cited in *Union Bank* was to increase the respondent's burden, assuming that the movant's burden had shifted, by abrogating the case law rule that allowed the respondent to oppose a summary judgment motion with its pleadings instead of evidence.<sup>386</sup> There are three confirming facts of the resolution's purpose: first, the resolution's underlined language refers solely to the respondent's burden; second, the reference in the Statement of Reasons to the last two sentences of Rule 56(e) solely addressed the respondent's burden; and third, the fact that the resolution was submitted in connection with Assembly Bill 498, the terms of which solely address the respondent's burden. If the Conference of Delegates had wanted the legislature to abrogate *Barnes*'s holding regarding the movant's burden, one would expect the State Bar would have submitted a resolution to that effect a year earlier in connection with Assembly Bill 2616, when the issue of the movant's burden was on the table.

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demonstrably show[] a carefully constructed pool, free of defects." *Id.*

381. *Id.*

382. See *supra* note 377 and accompanying text.

383. See *supra* note 376 and accompanying text.

384. See FED. R. CIV. P. 56(e); *Barnes*, 81 Cal. Rptr. at 447.

385. FED. R. CIV. P. 56(e) (emphasis added).

386. See *supra* note 376 and accompanying text.

What emerges from a reading of the resolution and its Statement of Reasons is that the movant and respondent's burdens confused the Conference of Delegates. The resolution's reference to *Barnes* is misplaced because *Barnes* does not hold that a respondent may oppose a properly supported summary judgment motion with its pleadings.<sup>387</sup> *Barnes* never reached that issue; rather, it held that the movant's burden did not shift, because the moving defendant did not meet its burden to negate the plaintiff's case.<sup>388</sup>

Once again, the inappropriate citing of decisions by the proponents of procedural amendments, *Celotex* in connection with Assembly Bill 2616<sup>389</sup> and *Barnes* in connection with Assembly Bill 498,<sup>390</sup> has generated confusion infiltrating summary judgment legislative history and summary judgment case law.

b. *Report prepared for Hearing of Senate Judiciary Committee held on June 29, 1993*

The *Union Bank* decision also purported to find support for its holding that Assembly Bill 2616 legislatively overruled *Barnes* in a report prepared for a June 29, 1993, hearing of the Senate Judiciary Committee on Assembly Bill 498.<sup>391</sup> The court stressed the report's reference to Rule 56(e) and its extensive discussion of the rule's Advisory Committee notes.<sup>392</sup> Again, these references to Rule 56(e) had no relevance to the movant's burden. They were, however, intended to justify Assembly Bill 498's proposed modification of the respondent's burden then under consideration by the Senate Judiciary Committee.<sup>393</sup>

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387. *Barnes*, 81 Cal. Rptr. at 447.

388. *Id.* The confused nature of the resolution's reference to *Barnes* is further evidenced by the resolution's additional statement that "[t]he problem with *Barnes* [*sic*] *v. Blue Haven Pools* is well summarized by the Notes of the Advisory Committee on the Federal Rules." Resolution 5-5-90, sponsored by State Bar Conference of Delegates, under cover letter from Theresa D. Taylor, Legislative Counsel of the State Bar of California, to Assembly Member Jan Goldsmith, Jan. 7, 1993, contained in SENATE COMMITTEE ON JUDICIARY FILE FOR A.B. No. 498, Reg. Sess. SP 11 (1993). The Advisory Committee addressed neither the *Barnes* decision by name nor the issue of the movant's burden. *See id.* The text of the Advisory Committee Notes that was quoted extensively in the resolution's Statement of Reasons addressed only the respondent's burden and the justification for overruling a line of Third Circuit cases that allowed the responding party to rely on the allegations of its pleadings to oppose a summary judgment motion. *See supra* note 376 and accompanying text.

389. *See supra* notes 319-70 and accompanying text.

390. *See supra* notes 371-88 and accompanying text.

391. *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653, 662 (Ct. App. 1995).

392. *Id.* at 662-63.

393. *Id.*; *see supra* notes 384-85 and accompanying text.

The court also found the following statement in the report significant:

In addition to these similarities, California has taken other steps to move our summary judgment law closer to federal law. A.B. 2616 (Peace) adopted other provisions of Rule 56, requiring each party seeking a summary judgment to prove up its own case without having to negate claims of the opposition.<sup>394</sup>

The court implied that this statement confirmed its view that the legislature intended, by its enactment of Assembly Bill 2616, to abrogate *Barnes's* requirement that the moving defendant negate the plaintiff's case.<sup>395</sup> This implication is incorrect.<sup>396</sup> The portion of the statement stating that "AB 2616. . . requir[ed] each party seeking a summary judgment to prove up its own case without having to negate claims of the opposition"<sup>397</sup> is, at best, an ambiguous description of the legislative intent underlying the enactment of Assembly Bill 2616 the previous year. This description probably derived from the same statement that appeared in the August 18 Report that the court cited earlier in its opinion.<sup>398</sup> As demonstrated above, this language is consistent with the legislative intent to relax only the moving plaintiff's summary judgment burden, not that of the moving defendant.<sup>399</sup>

Furthermore, the part of the statement that describes Assembly Bill 2616 as a step which moves California summary judgment law "closer to federal law"<sup>400</sup> is based upon the mistaken belief of Assembly Bill 2616's author that *Celotex* supports easing the moving plaintiff's burden in an offensive motion.<sup>401</sup>

394. *Union Bank*, 37 Cal. Rptr. 2d at 663.

395. *Id.*

396. The court ignored the following statement of "existing law" reminiscent of *Barnes*, contained in a report on Assembly Bill 498 to the Assembly Committee on the Judiciary: "Once a defendant . . . has met his or her burden by *disproving* one or more elements of the cause of action . . . the burden shifts to the plaintiff . . . to show that a triable issue of material fact exists as to the cause of action." STATE BAR OF CALIFORNIA REPORT ON A.B. 498 BEFORE THE ASSEMBLY COMM. ON JUDICIARY, Reg. Sess. 1 (1993) (emphasis added).

397. *Union Bank*, 37 Cal. Rptr. 2d at 663 (quoting *Hearing on A.B. 498 Before the Senate Comm. on Judiciary*, Reg. Sess. 4 (Cal. 1993-1994) [hereinafter *Hearing on A.B. 498*]).

398. See *supra* note 326 and accompanying text.

399. See *supra* notes 319-64 and accompanying text.

400. *Union Bank*, 37 Cal. Rptr. 2d at 663 (quoting *Hearing on A.B. 498*, *supra* note 397).

401. See *supra* notes 343-59 and accompanying text.

c. *Report prepared by the Office of Senate Floor Analyses*

The last item of legislative history referred to in the *Union Bank* decision is a report prepared by the Office of Senate Floor Analyses on Assembly Bill 498.<sup>402</sup> The court found support for its holding in that report's opinion, which stated that "[t]he purpose of this bill is to clarify the law relating to summary judgment and summary adjudication and to bring it closer to the federal law relating to these same procedures."<sup>403</sup> The remainder of the report clarifies that the only aspect of federal summary judgment law referred to is Rule 56(e), which "require[s] a party *opposing* a motion for summary judgment . . . [to] set forth specific facts showing that a triable issue of material fact exists as to the cause of action or defense instead of relying merely on the allegations in its pleadings."<sup>404</sup>

3. The Legislative History of the 1992 and 1993 Amendments to Section 437c Does Not Support *Union Bank's* Holding

The *Union Bank* opinion concluded:

Taken together, the 1992 and 1993 amendments to section 437c legislatively overruled this division's holding in *Barnes v. Blue Haven Pools* insofar as it prohibited a summary judgment motion from being granted when a moving defendant merely relies on a plaintiff's factually devoid interrogatory answers. Whatever uncertainty may have existed after the 1992 legislation was approved by the Governor as to the continued viability of *Barnes*, the purpose of Assembly Bill No. 498 is unmistakable.<sup>405</sup>

The foregoing analysis of the legislative history reveals that critical links needed to connect legislative history with the court's conclusion are missing.<sup>406</sup> Acknowledging that some uncertainty existed after the enactment of Assembly Bill 2616, the court relied heavily on the legislative history of Assembly Bill 498 to support its holding.<sup>407</sup> The opinion made the unsupported statement that the "object in view" and "the problem the Legislature was addressing" when it considered Assembly Bill 498 was "that the burden shifting characteristics of rule 56 as interpreted in [*Celotex*] were to be applied to California summary judgment motions

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402. *Union Bank*, 37 Cal. Rptr. 2d at 663.

403. *Id.* (quoting STATE BAR OF CALIFORNIA, REPORT OF OFFICE OF SEN. FLOOR ANALYSES ON A.B. 498, Reg. Sess. 2 (1993)).

404. STATE BAR OF CALIFORNIA, REPORT OF OFFICE OF SEN. FLOOR ANALYSES ON A.B. 498, Reg. Sess. 1 (1993) (Digest section) (emphasis added).

405. *Union Bank*, 37 Cal. Rptr. 2d at 663 (citations omitted).

406. *See id.* at 653-66.

407. *See supra* notes 371-404 and accompanying text.

when a defendant relied on a plaintiff's factually inadequate discovery answers to seek summary judgment."<sup>408</sup>

The legislative history of Assembly Bill 498 plainly shows that the "object in view" was to stiffen the respondent's burden by adopting the substance of the last two sentences of Rule 56(e).<sup>409</sup> The legislature achieved this objective when it enacted Assembly Bill 498 to add the extra requirement that "[the responding party] may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth . . . specific facts."<sup>410</sup>

To support its holding, the *Union Bank* court picked up on references in the legislative history to *Celotex* and *Barnes*. Some of these references are inappropriate, such as the statement in the August 18 Report that implied that *Celotex* supported the proposed revision of the moving plaintiff's burden.<sup>411</sup> Other references are vague or overbroad, such as the June 29, 1993, Report to the Senate Judiciary Committee on Assembly Bill 498, which stated in reference to Assembly Bill 2616: "California has taken other steps to move our summary judgment law closer to federal law."<sup>412</sup>

Although the issue in both *Celotex* and *Union Bank* concerned the burden on a moving defendant in the context of a defensive summary judgment motion,<sup>413</sup> statements in the legislative history of Assembly Bill 2616 and Assembly Bill 498 referring to *Celotex* or to Rule 56 are made in the context of this issue. The references to federal summary judgment law were made to justify either relaxing the burden of a moving plaintiff in an offensive summary judgment motion or increasing the burden on a responding plaintiff to set forth specific facts to show the existence of a genuine issue. The 1992 and 1993 amendments did, indeed, make it easier to win summary judgment motions in California. To this extent, these amendments are consistent with the liberal summary judgment spirit of *Celotex* and the other two trilogy cases. But the legislative history relied upon in *Union Bank* does not indicate that the legislature intended to overrule *Barnes* or in any other way incorporate into Cal-

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408. *Union Bank*, 37 Cal. Rptr. 2d at 663.

409. See *supra* notes 382-88 and accompanying text.

410. § 437c(o)(1) & (2).

411. See *supra* notes 343-59 and accompanying text.

412. See STATE BAR OF CALIFORNIA, REPORT ON A.B. 498 BEFORE THE SENATE COMM. ON JUDICIARY, Reg. Sess. 4 (1993).

413. See *supra* notes 217-18 (*Celotex*) and 315-18 (*Union Bank*) and accompanying text.

ifornia summary judgment law *Celotex's* approach to the burden on a moving defendant in a defensive motion.<sup>414</sup>

#### 4. The Aftermath of *Union Bank*

*Union Bank* has not settled the issue of what initial showing a moving defendant must make on a defensive motion for summary judgment. It succeeded in unsettling the settled case law rule that requires the defendant to disprove affirmatively elements of the plaintiff's case. *Union Bank* has not been reviewed by the California Supreme Court.<sup>415</sup> Its im-

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414. Assembly Member Peace, the author of Assembly Bill 2616, confirmed in a letter inserted into the Assembly Daily Journal on September 8, 1993, that:

[T]he suggestion that post AB 2616 a defendant can now meet its burden of proof simply by pointing out that the nonmoving party has no evidence, as is allegedly the case under *Celotex*, is simply not true. AB 2616 merely codified the already existing burden of proof for defendants without change . . . .

. . . AB 498 makes crystal clear that the intent behind AB 2616 was to provide that a plaintiff may obtain a summary judgment if it proves upon the allegations of its complaint. I trust that this puts to rest any questions as to the intent behind AB 2616 as to summary judgments.

CALIFORNIA LEGISLATURE, ASSEMBLY DAILY JOURNAL, REPORT TO THE GEN. ASSEMBLY OF 1993-94, at 4190 (1993).

The *Union Bank* court stated that it could not rely on Assembly Member Peace's letter, and, even if the court could consider it, "when weighed against the other evidence of legislative intent [the letter] is insufficient to support the conclusion that [*Barnes*] is still a valid statement of California law insofar as it prohibits a defendant from securing a summary judgment based upon a plaintiff's factually incomplete discovery responses." *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653, 664 (Ct. App. 1995).

It should also be noted that Assembly Bill 498, like Assembly Bill 2616, was supported by the California Trial Lawyers Association. It is difficult to believe that the trial lawyers would have supported Assembly Bill 498 if they suspected that this bill, or anything said about it as it proceeded through the legislature, could be interpreted as providing support for overruling *Barnes*. REPORT ON A.B. 498 BEFORE THE ASSEMBLY COMM. ON JUDICIARY, Reg. Sess. 2 (Cal. 1993).

415. The California Supreme Court added to the confusion over the movant's burden in *Flowers v. Torrance Memorial Hospital Medical Center*, 884 P.2d 142 (Cal. 1994), which was decided one month before *Union Bank*. The *Flowers* court stated that "the defendant must *conclusively negate* a necessary element of the plaintiff's case and demonstrate that under no hypothesis is there a material issue of fact that requires the process of a trial." *Id.* at 146 (emphasis added). This language could be read as rejecting *Union Bank's* interpretation of the 1992 and 1993 amendments. See *id.* However, commentators have recognized that "the summary judgment in *Flowers* predated the 1992 amendments to CCP section 437c," and that the supreme court may not have been interpreting these amendments. See WEIL & BROWN, *supra* note 296, § 10:241.5. The supreme court should have mentioned this fact in order to qualify its statement when addressing the movant's burden. *Flowers*, like *Union Bank*, provides another example of the role courts have played in compounding the confusion regarding California summary judgment law.

pact in other appellate districts is not yet clear.

For example, there is reason to doubt whether the superior courts in Orange County follow *Union Bank*. Jamie Morell and Robin Brandes-Gibbs, who serve on the staff of the Legal Research Department of the Orange County Superior Courts, stated before the *Union Bank* decision that the 1992 and 1993 amendments "did not change the existing burden of proof on a moving party defendant."<sup>416</sup> Morell, who is the Legal Research Department's summary judgment specialist, still holds this view after *Union Bank*.<sup>417</sup> The unsuccessful legislative attempt in 1996 to enact Assembly Bill 3113 provides additional evidence of the uncertain status of *Union Bank*. This proposed amendment to the summary judgment law would have clearly adopted the *Celotex* approach to defining the moving defendant's burden. The sponsors of this proposed amendment did not believe that *Union Bank*'s interpretation of the phrase "cannot be established" in section 437(o)(2) resolved the issue.<sup>418</sup>

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416. Brandes-Gibbs & Morell, *supra* note 296, at 7. Specifically, Gibbs and Morell argue that the phrase "cannot be established" denotes impossibility" and that the legislature's use of "cannot be established," borrowed from the 1990 amendment to section 437c(f) to define the moving defendant's burden in the 1992 amendment, shows that "the legislature is presumed to have intended to reaffirm existing case law." *Id.*

417. Telephone Interview with Jamie Morell, Staff Member, Legal Research Department of the Orange County Superior Courts (Feb. 14, 1996).

Language reminiscent of the traditional negation standard still crops up in case law. For example, in *Sanchez v. Swinerton & Walberg Co.*, 55 Cal. Rptr. 2d 415 (Ct. App. 1996), the Second District Court of Appeal applied the following summary judgment standard:

To secure summary judgment, a moving defendant may prove an affirmative defense, *disprove at least one essential element of the plaintiff's cause of action . . .* or show that an element of the cause of action cannot be established . . . . *The defendant must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial.*

*Id.* at 417 (internal quotations omitted) (emphasis added). The court cited several pre-*Union Bank* cases in support of its standard but omitted *Union Bank* itself. The court cited *Union Bank* later in the opinion during its discussion of the appellate scope of review. *Id.* at 418.

418. Assembly Bill 3113's author stated in a Background Information Request submitted to the Senate Judiciary Committee that

[a]s it currently reads, CCP 437c(o)(1) and (2) imply the moving party has the burden of negating the claim or defense of any nonmoving party bearing the burden of proof. *Celotex* has clarified that is not the law under Federal Rule 56. . . .



In those jurisdictions that claim to follow *Union Bank* as persuasive authority, it is unclear what *Union Bank* means, just as it is unclear what *Celotex* means in defining what, at a minimum, a moving defendant must do to show an absence of evidence by the plaintiff. If it is true, as the First District Court of Appeal stated, that *Union Bank* has taken the lead in moving California summary judgment "toward the federal direction,"<sup>419</sup> there is a sharp difference of opinion over how far along this road *Union Bank* actually travels.<sup>420</sup>

Cases and commentary after *Union Bank* reflect substantial confusion over how much of an affirmative burden, if any, the moving defendant must shoulder on a summary judgment motion before the burden shifts to the plaintiff to prove up its *prima facie* case.<sup>421</sup> Does the statutory language "cannot be established"<sup>422</sup> boil down to an illusory burden that simply allows the moving defendant to "point[] out to the court" an "absence of evidence" on the plaintiff's side?<sup>423</sup> Or does the statutory phrase connote a requirement that the defendant must make a more affirmative showing? If so, how affirmative must that showing be, in terms of the amount of discovery a defendant must engage in, to show that a plaintiff "cannot establish" an essential element of its case? Will the

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To conform to the Federal standard, CCP 437(o)(1) and (2) are deleted . . . .

BACKGROUND INFORMATION REQUEST, SENATE JUDICIARY COMMITTEE, MEASURE: AB 3113; AUTHOR: GOLDSMITH (on file with author). Goldsmith was also the author of Assembly Bill 498, which formed part of the legislative history that was heavily relied upon by the *Union Bank* court.

The Bill Analysis submitted to the Senate Judiciary Committee underscores the confusion surrounding the effect of the 1992 and 1993 amendments on a movant's burden:

Since the 1992 and 1993 amendments, there has been much commentary on whether it was the legislature's intent to adopt the federal standards governing burden of proof on summary judgment motions. This bill appears to confuse matters further by just entirely wiping out the burden of production language with no statement of purpose to guide the judicial branch in future litigation.

A.B. 3113 Bill Analysis Submitted to Senate Judiciary Comm., Hearing Date Aug. 7, 1996, at 7.

419. *Hunter v. Pacific Mechanical Corp.*, 44 Cal. Rptr. 2d 335, 338 (Ct. App. 1995).

420. One practitioner refers to *Union Bank's* "far reaching holdings," while acknowledging that "[t]he court, however, purported to limit its holding only to the issues raised by the *Union Bank's* summary judgment motion." Grillo, *supra* note 313, at 217.

421. See *infra* notes 425-64 and accompanying text.

422. § 437c(o)(2).

423. The *Celotex* opinion states that "the burden on the moving party may be discharged by 'showing'—that is, *pointing out to the district court*—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (emphasis added).

plaintiffs "factually devoid interrogatory answers" do the trick for the moving defendant? Will something less suffice, such as the plaintiffs "factually vague deposition testimony?" Must the defendant track down and negate every potential source of evidence that might blossom into evidence for the plaintiff at trial?<sup>424</sup>

Weil and Brown's influential treatise on California civil practice has made broad pronouncements regarding *Union Bank's* impact on the defendant's burden as the moving party.<sup>425</sup> They incorrectly cite *Union Bank* as case authority for their assertions that section 437c "captures the essence" of and is "virtually the same" as Federal Rule 56.<sup>426</sup> The portions of the legislative history quoted in *Union Bank* upon which these sweeping statements are based include Assembly Bill 498 and Rule 56(e), both of which require the responding party to set forth specific facts to oppose a summary judgment motion.<sup>427</sup> The actual passage in the report prepared for the Senate Judiciary Committee on Assembly Bill 498 relating to "capturing the essence" of Rule 56, quoted by the *Union Bank* court, reads: "AB 498 captures the essence of Rule 56(e) by requiring the opposing party to set forth specific facts in opposing a motion."<sup>428</sup> This kind of imprecise reference to *Union Bank*, like the im-

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424. While each justice on the *Celotex* Court rejected the *Adickes* requirement that the moving defendant must provide affirmative evidence disproving the plaintiff's case, three justices disagreed with the majority as to exactly "what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case." *Id.* at 329 (Brennan, J., dissenting). Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, dissented and argued that under the new standard announced by the majority, *Celotex* had not met the movant's burden to show an absence of evidence in the record to support the plaintiff's claim. *Id.* (Brennan, J., dissenting). Justice Brennan reasoned that *Celotex* failed to meet its burden because *Celotex* knew of the existence in the record of a potential witness for the plaintiff and did not depose that witness to negate the possibility of his providing relevant testimony to support the plaintiff's case. *Id.* at 329-30 (Brennan, J., dissenting).

Justice White, in a concurring opinion, clearly stated that "it is the defendant's task [as moving party on summary judgment] to negate, if he can, the claimed basis for the suit." *Id.* at 328 (White, J., concurring). Justice White also suggested that, toward that end, it is the defendant's burden, not the plaintiffs, to conduct discovery. *Id.* (White, J., concurring). This standard comes fairly close to the rejected *Adickes* approach that required the moving defendant to "negate" the plaintiff's claim with affirmative evidence. Thus, the *Celotex* Court was split over what a moving defendant must do to satisfy its burden.

425. WEIL & BROWN, *supra* note 296, § 10:240.

426. *Id.* § 10:243.

427. *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653, 662-63 (Ct. App. 1995).

428. *Id.* at 663 (emphasis added). In contrast to Weil and Brown's assertion that

precise reference to *Celotex*,<sup>429</sup> contributes to the confusion regarding the appropriate standard for determining the movant's burden.

The *Union Bank* decision carefully avoided any sweeping pronouncements regarding the effect of *Celotex* on summary judgment in California and took particular care to craft its holding very narrowly.<sup>430</sup> The *Union Bank* court cautioned:

We recognize that there may be other aspects of the legislatively intended changes resulting from the 1992 and 1993 amendments to section 437c. However, the only issue raised by this petition relates to whether *Barnes v. Blue Haven Pools* required that the summary judgment motion at issue be denied. Our opinion can only be read to apply to the specific issue before the court. We are not addressing other issues concerning the manner rule 56 of the Federal Rules of Civil Procedure may apply to California summary judgment motions or the further applicability of *Celotex Corp. v. Catrett* to section 437c as amended in 1992 and 1993.<sup>431</sup>

The actual holding of *Union Bank*—that the 1992 and 1993 amendments to section 437c overruled *Barnes* to the extent that *Barnes* barred a summary judgment motion from being granted when the moving defendant relies only on a plaintiff's factually devoid interrogatory answers—is very narrow.<sup>432</sup> *Union Bank* nowhere refers to *Celotex*'s broad language that "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."<sup>433</sup>

The Sixth Appellate District has taken a cautious approach in citing *Union Bank*, emphasizing the narrowness of that decision's holding and confining its persuasive value to instances when the moving defendant relies on the plaintiff's factually devoid interrogatory answers.<sup>434</sup> In *Hagen v. Hickenbottom*, the court of appeal expressed concern over the misuse of *Union Bank* by those who proclaim that *Union Bank* brought California summary judgment all the way to a full-blown, broad construction of *Celotex*.<sup>435</sup> While acknowledging that "[t]here is evidence that

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"the substance of [437c(o) and Rule 56] is virtually the same," WEIL & BROWN, *supra* note 296, § 10:243, *Union Bank*'s actual quotation from the report to the Senate Judiciary Committee, which specifically referred to the opposing party's burden, reads: "The language adopted by this bill is not Rule 56(e) verbatim, but reflects the specific requirements of California law. However, technically different the substance of each is virtually the same." *Union Bank*, 37 Cal. Rptr. 2d at 663 (quoting STATE BAR OF CALIFORNIA, REPORT ON A.B. 498 BEFORE THE SENATE COMM. ON JUDICIARY, Reg. Sess. 3 (1994)).

429. See *supra* notes 346-64 and accompanying text.

430. *Union Bank*, 37 Cal. Rptr. 2d at 665.

431. *Id.* (citations omitted).

432. *Id.* at 663.

433. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

434. *Hagen v. Hickenbottom*, 48 Cal. Rptr. 2d 197, 206-08 (Ct. App. 1995).

435. *Id.*

the 1992 and 1993 amendments were in some respects influenced by the decision of the United States Supreme Court in *Celotex*,<sup>436</sup> the *Hagen* court recognized that a group of commentators overemphasized the influence of *Celotex* on the amendments.<sup>437</sup>

[T]hose who support the view that the amendments have substantially lessened a moving defendant's burden sometimes point to *Celotex*'s statement that, under the federal summary judgment rule, where at trial the nonmoving party would have the burden of proving the element in issue "the burden on the moving party may be discharged by 'showing'—that is, *pointing out to the district court*—that there is an absence of evidence to support the nonmoving party's case."<sup>438</sup>

Rejecting the view that "a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case," the *Hagen* court held that the words "cannot be established" require a defendant to make an "affirmative showing" in support of its motion.<sup>439</sup> In an apparent rejection of the broad standard articulated in *Celotex*, *Hagen* adopted the following movant's burden standard, a movant's burden "with teeth," that provides responding plaintiffs with some protection against unsupported motions:

Such a showing connotes something significantly more than simply "pointing out to the . . . court" that "there is an absence of evidence": Before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case.<sup>440</sup>

In *Hagen*, the plaintiffs brought an action to set aside a trust on the theory that the defendant exercised undue influence over the decedent.<sup>441</sup> The moving defendant did not rely on any of the plaintiff's factually devoid interrogatory answers but, rather, upon the plaintiff's "factually vague" deposition testimony.<sup>442</sup> In his successful motion for summary judgment, the defendant relied upon the plaintiffs' deposition testimony that indicated the plaintiffs did not have any personal knowledge of undue influence by defendant.<sup>443</sup> While acknowledging that the re-

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436. *Id.* at 206 (citation omitted).

437. *Id.* The *Hagen* court specifically listed Weil and Brown's view as being too expansive. *Id.*

438. *Id.* (quoting *Celotex*, 477 U.S. at 325).

439. *Id.* at 207.

440. *Id.*

441. *Id.*

442. *Id.* at 198-202.

443. *Id.*

cord suggested that the plaintiffs' "prospects of ultimately proving undue influence [were] slight,"<sup>444</sup> the court nevertheless held that the defendant failed to meet its burden to show the plaintiffs could not establish undue influence, because they "almost certainly would not have been present" had such undue influence occurred.<sup>445</sup> Therefore, the burden did not shift to the plaintiff to prove a *prima facie* case.<sup>446</sup> The court of appeal thus drew a line between cases that are simply weak and those that "cannot be established."<sup>447</sup>

In support of its holding, the *Hagen* court cited *Villa v. McFerren*,<sup>448</sup> an opinion decided five months after *Union Bank* by the same appellate district that decided *Union Bank*. The court in *Villa* held that a defendant's moving papers—comprised only of the plaintiff's factually vague deposition responses—failed to meet the burden of proof necessary to shift the burden to the plaintiff to show a triable issue of fact.<sup>449</sup> The *Villa* court devoted a full four pages to make the point that the current summary judgment statute, incorporating the 1992 and 1993 amendments, still places on the moving party the burden of proving its right to summary judgment and, if that burden is not met, the motion must be denied "even though the opposing party has not responded sufficiently or at all."<sup>450</sup> Reaffirming the continued vitality of the movant's burden under *Union Bank* and *Celotex*, the *Villa* court quoted a portion of the *Celotex* opinion:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demon-

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444. *Id.* at 208.

445. *Id.*

446. *Id.* The court questioned why the defendant "did not employ discovery tactics—such as legitimately founded state-all-facts interrogatories—more likely in these circumstances to lead to a well-founded conclusion that the [plaintiffs] could not establish their case." *Id.* at 208-09.

447. *Id.* at 208.

448. 41 Cal. Rptr. 2d 719 (Ct. App. 1995).

449. *Id.* at 729. The plaintiff in *Villa* brought an action for civil conspiracy and acknowledged at his deposition that he was personally unaware of any significant communication between the alleged co-conspirators. *Id.* at 720. As in *Hagen*, the court ruled that the plaintiff's deposition testimony was insufficient to shift the burden to the plaintiff to establish a *prima facie* case in opposition to the defendant's summary judgment motion, concluding that such communication would not have been made in the plaintiff's presence. *Id.* The *Villa* court noted that "[t]here are a myriad of litigation scenarios where, in a case like the present one, a moving party can shift the burden of proof on a conspiracy issue," such as the defendant's filing a declaration denying the alleged communications, or filing plaintiff's factually devoid interrogatory answers. *Id.* at 729.

450. *Id.* at 725.

strate the absence of a genuine issue of material fact.<sup>451</sup>

However, the Court did not cite the portion of the *Celotex* opinion that stated that the movant's burden may be discharged simply by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case."<sup>452</sup> Thus, the Second and Sixth Appellate Districts appear to agree that the movant's burden under the current summary judgment statute continues to provide the opposing plaintiff with real protection against unsupported summary judgment motions, and that *Union Bank* does not stand for *Celotex's* proposition that a moving defendant may discharge its burden by "pointing out" to the court an "absence of evidence."<sup>453</sup>

The First Appellate District, on the other hand, is in sharp conflict with the Second and Sixth Appellate Districts. In *Hunter v. Pacific Mechanical Corp.*,<sup>454</sup> the First District Court of Appeal held that a defendant could "show" that the element of causation "cannot be established" by pointing to an *absence of evidence* to support this element.<sup>455</sup> The evidence to which the defendant pointed was the plaintiff's "factually vague discovery responses" that the court held sufficient to shift the burden to the plaintiff to prove a *prima facie* case of causation.<sup>456</sup>

The plaintiff Hunter, a bricklayer at various construction sites, sued defendant PMC, a contractor, claiming that he sustained asbestos-related injuries through exposure to asbestos as a result of working in close proximity to PMC employees.<sup>457</sup> In affirming summary judgment for PMC, the court held that PMC's reliance on Hunter's deposition testimony that he was personally unaware of PMC's activities at any of the job sites at which he worked was sufficient to shift the burden to Hunter, who was unable to meet that burden.<sup>458</sup> The court of appeal held that Hunter's lack of personal knowledge satisfied PMC's burden to point out the absence of proof by Hunter for causation.<sup>459</sup>

The Sixth District Court of Appeal in *Hagen* "respectfully questioned"

451. *Id.* at 727 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

452. *Celotex*, 477 U.S. at 325.

453. *Hagen v. Hickenbottom*, 48 Cal. Rptr. 2d 197 (Ct. App. 1995); *Villa*, 41 Cal. Rptr. 2d at 727.

454. 44 Cal. Rptr. 2d 335 (Ct. App. 1995).

455. *Id.* at 338 (quoting § 437c(o)(2)).

456. *Id.*

457. *Id.* at 336.

458. *Id.* at 339.

459. *Id.*

the *Hunter* court's conclusion "that 'factually vague' deposition responses by the plaintiff himself sufficed, in the circumstances of that case, to shift the burden to the plaintiff."<sup>460</sup> Noting its alignment with the Second Appellate District on the issue, the *Hagen* court stated that *Villa* "reached a result consistent with our perception of the effect of the 1992 amendments to the summary judgment statute."<sup>461</sup> Five months after its decision in *Hagen*, the Sixth District Court of Appeal once again attacked *Hunter*, going further than it did in *Hagen*. In *Addy v. Bliss & Glennon*,<sup>462</sup> the Sixth District panel stated that "the [*Hunter*] court . . . may be understood to suggest that a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case," a proposition with which it vigorously disagreed in *Hagen*.<sup>463</sup>

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460. *Hagen v. Hickenbottom*, 48 Cal. Rptr. 2d 197, 208 (Ct. App. 1995).

461. *Id.* The same panel that decided *Hunter* appears to have generated confusion within the first district by its decision only two months later in *Vann v. Travelers Cos.*, 46 Cal. Rptr. 2d 617 (Ct. App. 1995). According to practice commentary, "the same panel ignored and contradicted *Hunter*, *Union Bank* and the Section 437c amendments." Richard A. Eggerth & Elizabeth A. McIntyre, *Lonely Hunter*, L.A. DAILY J., Mar. 14, 1996, at 7. In *Vann*, a landlord sued a tenant for dumping toxic waste on the leased premises. *Vann*, 46 Cal. Rptr. 2d at 618. *Vann*'s liability insurance carrier declined to defend him based on a pollution exclusion clause in his policy that excluded from coverage any pollution-related liability. *Id.* This clause, however, contained an exception for the "sudden and accidental" discharge of pollutants. *Id.* at 619. In *Vann*'s suit against Travelers for declaratory relief, Travelers moved for summary judgment, pointing to an absence of evidence of a "sudden and accidental" discharge. *Id.* Reversing the trial court's order of summary judgment in Travelers' favor, the court of appeal stated: "Given Travelers' burden to negate coverage as a matter of law, the facts that it has marshalled in this regard are surprisingly weak." *Id.* at 621 (emphasis added).

The commentary expressed surprise that the court had refused to consider the impact of *Hunter*, *Union Bank*, and the 1992 amendment to section 437c on the issue of whether Travelers met its burden as the moving party. Eggerth & McIntyre, *supra*, at 7. It should be pointed out, however, that the authors of this commentary are specialists in liability defense and coverage litigation. *Id.* Complicating the summary judgment issue in *Vann* were questions concerning special burdens imposed by substantive insurance law on insurance companies in duty to defend cases. *Id.*

462. 51 Cal. Rptr. 2d 642 (Ct. App. 1996).

463. *Id.* at 647. The sixth district in *Addy* went out of its way to explain that a moving defendant may not shift the burden to the plaintiff to put on a prima facie case simply by pointing out to the court the absence of essential evidence to support plaintiff's case, and that a defendant must make an affirmative showing in support of his or her motion.

*Id.* at 645 (dictum). In an opinion that omitted any reference to *Union Bank*, the court went on to hold that the defendant in *Addy* "did not merely 'point to' Addy's lack of evidence to support her claim but rather submitted evidence itself demonstrating that Addy could not support her claim" and that such evidence satisfied the required "affirmative showing." *Id.* at 649 & n.1. This statement reflects the intensity

The recent failed attempt by advocates of the liberal *Celotex* approach to enact yet another amendment to section 437c, the avowed purpose of which was "to conform California's summary judgment standard to the federal summary judgment standard," indicates that *Union Bank* has not settled the issue of the movant's burden.<sup>464</sup>

*F. Assembly Bill 3113: The Failed Attempt to "Enact Celotex"*  
(or, Rather, a Very Rough Approximation Thereof)

On March 5, 1996, Republican Governor Pete Wilson proposed Assembly Bill 3113, an amendment to section 437c, as part of his civil justice reform package.<sup>465</sup> The avowed purpose of the bill was "to conform California's summary judgment standard to the federal summary judgment standard."<sup>466</sup> The bill had many supporters, including the Association for California Tort Reform, California Manufacturers Association, California Defense Counsel, the California Employment Council, the Consulting Engineers & Land Surveyors of California, and the California Judicial Council.<sup>467</sup> The Consumer Attorneys of California, a trial lawyers professional association, and the Committee on the Administration

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of the court's concern that vague references to *Celotex* in the legislative history of the 1992 and 1993 amendments are being misused to dilute the movant's burden beyond the holding in *Celotex* itself.

464. *Analysis of A.B. 3113 Bill Submitted to Comm. on Senate Judiciary*, Aug. 7, 1996, Reg. Sess. 2 (Cal. 1995-1996); see also *Hearings on A.B. 3113 Before the Senate Comm. on Judiciary*, August 7, 1996, Reg. Sess. 4 (Cal. 1995-1996) [hereinafter *Hearings on A.B. 3113*].

465. *Wilson Announces Civil Law Reforms*, UPI, Mar. 5, 1996, available in LEXIS, News Library, UPI File. Along with Assembly Bill 3113, the package included the following bills: Assembly Bill 3259, which would modify joint and several liability among tort defendants; Senate Bill 1429, which would encourage early resolution of civil disputes by referring parties to early mediation in all cases; Assembly Bill 3364, which prohibits attorneys' contingent fee charges from exceeding 15% of the settlement amount; and Assembly Bill 3381, which directs cases involving damage claims of less than \$50,000 from superior court into municipal court by raising the jurisdictional limit of municipal courts from \$25,000 to \$50,000. *Id.* The three latter proposals are consistent with the "restrictive access" paradigm goals of discouraging formal litigation and steering cases involving low damages to less formal dispute resolution fora. *Id.*

466. See *Hearings on A.B. 3113*, *supra* note 464, at 4.

467. The Judicial Council withdrew its support when the Senate Judiciary Committee amended Assembly Bill 3113 to delete provisions that established the movant's burden.



of Justice of the State Bar opposed the bill.<sup>468</sup>

Assembly Bill 3113 passed the Republican-controlled assembly before it was defeated by the Democrat-controlled Senate Judiciary Committee in August 1996. Although it was never enacted, Assembly Bill 3113 nevertheless merits inclusion in the summary judgment saga for two reasons. First, a Republican-controlled senate<sup>469</sup> would have enacted the law. Second, Assembly Bill 3113 was the first overt attempt by judicial "reformers" to legislate *Celotex* into California summary judgment law. Assembly Bill 3113 is consistent with the Quayle Report's civil justice reform agenda and is, therefore, a prime example of politically charged procedure.<sup>470</sup> The Assembly Bill 3113 episode provides insight into how politically charged procedure plays out in the California legislature and reveals implications for the legislative primacy rulemaking process.

Assembly Bill 3113 would have made bad summary judgment law for several reasons. First, the proposed bill was the latest in a series of poorly drafted patchwork amendments to the summary judgment statute.<sup>471</sup> Second, the proposed bill overshot its self-proclaimed objective of enacting *Celotex* into state procedural law.<sup>472</sup> Finally, the proposed bill violated key tenets of good procedure.<sup>473</sup>

#### 1. More "Patchwork" Amendments

Assembly Bill 3113 continued the tradition of codifying legislative procedural law by embroidering upon a crazy quilt of badly drafted, overly amended text. Given the bill's stated purpose of conforming California summary judgment law to the federal standard,<sup>474</sup> Assembly Bill 3113 presented an ideal opportunity to truly reform California's summary judgment law by overhauling and simplifying the summary judgment statute. Many states have adopted the federal rules in their entirety, or close approximations thereof.<sup>475</sup> The bill's authors attempted to insert the Supreme Court's interpretation of the comparatively simple federal standard into an overly amended and complex "code" statute.

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468. See *Hearings on A.B. 3113*, *supra* note 464, at 4-5.

469. The 1994 elections left the Democrats with a "paper-thin" majority in the State Senate of 21 out of 40 seats. Republican prospects for taking control of the Senate in 1996 were good, owing to retirements, term limits, and reapportionment. See CALIFORNIA POLITICAL ALMANAC 150 (Stephen Green ed., 4th ed. 1995-1996).

470. See *supra* notes 111-18 and accompanying text.

471. See *infra* notes 476-89 and accompanying text.

472. See *infra* notes 490-95 and accompanying text.

473. See *infra* notes 496-506 and accompanying text.

474. See *supra* note 466 and accompanying text.

475. See *supra* note 17 and accompanying text.

*a. Assembly Bill 3113 as passed by the Assembly*

Two key textual changes proposed in Assembly Bill 3113 would conform section 437c to the federal *Celotex* standard of summary judgment. First, the phrase "no genuine issue" replaced the phrase "no triable issue" so as to conform California terminology to Rule 56.<sup>476</sup> Had the bill passed, the first sentence of subsection (c) would have read: "The motion for summary judgment shall be granted if all the papers submitted show that there is no genuine issue as to any material fact . . . ."<sup>477</sup> The second change in the proposed bill would have defined "no genuine issue as to any material fact" to be where "no reasonable jury could return a verdict for the nonmoving party on the matter that is the subject of the motion for summary judgment."<sup>478</sup> This language comes not from Rule 56, but from *Celotex's* holding that equated the standard for granting summary judgment with the standard for granting a directed verdict motion at trial.<sup>479</sup>

The authors of Assembly Bill 3113 could have avoided ambiguity in the bill had they pruned away the old statutory phrases "has no merit" and "cannot be established" and replaced them with the new terminology "no genuine issue." True to the "code" tradition, however, the bill not only retained the antiquated and ambiguous statutory terms, but added a new one for good measure.<sup>480</sup> Subsection (o)(2) of the bill provided that "[a] defendant . . . has met his or her burden of showing that a cause of action *has no merit* if there is no evidence of *sufficient substantiality* to

476. The first draft of Assembly Bill 3113, however, contained a glitch. Subsection (c) properly referred to "no genuine issue," but the author forgot to change subsequent references to "no triable issue" in subsections (g) and (o)(1) to "no genuine issue."

477. *A.B. 3113 as Amended in Assembly*, May 15, 1996, Reg. Sess. (Cal. 1996).

478. *Id.*

479. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

480. The bill's definition of the moving defendant's burden, contained in subsection (o)(2), does not frame that burden in terms of requiring a showing that there is "no genuine issue," which would have been logical in light of subsection (c). This is the approach of Rule 56, which consistently and exclusively employs the standard "no genuine issue" to define the movant's burden and the ultimate burden of persuasion to be used by the court in determining the motion. FED. R. CIV. P. 56. The moving party not only has the initial burden to come forward with materials sufficient to show that there is no genuine issue as to any material fact, but also bears the ultimate burden of persuading the court that, on all the documents submitted by both movant and respondent, there is no genuine issue as to any material fact. *Id.*

support one or more elements of the cause of action.”<sup>481</sup> The words “sufficient substantiality” were to replace “cannot be established” because despite *Union Bank’s* holding, the language “cannot be established” still smacked of the restrictive “negation” approach. However, the new statutory formulation “sufficient substantiality” would have added yet another layer of ambiguity to the definition of the movant’s burden.<sup>482</sup> Had the authors resisted the typical “code” tendency to throw nothing out, these drafting problems could have been avoided simply by replacing all references to “has no merit” with “no genuine issue” to define the standard for the moving defendant’s burden as well as the overall standard governing the court’s determination of summary judgment and summary adjudication motions.

The original draft of Assembly Bill 3113 had two additional major defects. First, although the proposed amendment to subsection (o)(2) purported to define the moving defendant’s burden on summary judgment, it failed to articulate what the movant must do to show that the plaintiff’s

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481. *A.B. 3113 as Amended in Assembly*, May 15, 1996, Reg. Sess. (Cal. 1996) (emphasis added). The phrase “sufficient substantiality” is derived from California case law that defines the level of sufficiency required of plaintiff’s trial evidence to avoid a nonsuit. Under this case law rule, a motion for nonsuit, the equivalent of a federal motion for a directed verdict, now called “motion for judgment as a matter of law” under amended Rule 50, may be granted

only when, disregarding conflicting evidence and giving to plaintiff’s evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of *sufficient substantiality* to support a verdict in favor of the plaintiff.

*Damesghi v. Texaco Refining & Mktg., Inc.*, 6 Cal. Rptr. 2d 515, 528 (Ct. App. 1992) (emphasis added), *overruled by* *Trope v. Katz*, 902 P.2d 259 (Cal. 1995).

The purpose of Assembly Bill 3113 was to enact into California summary judgment law the Supreme Court’s pronouncement in *Liberty Lobby* and *Celotex* that the “standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a).” *Celotex*, 477 U.S. at 323; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The use of the phrase “sufficient substantiality” to define the moving defendant’s burden under the proposed amendment to section 437c(o) intended to add to the movant’s burden a sufficiency of the evidence nonsuit standard with which California courts were already familiar. *A.B. 3113 as Amended in Assembly*, May 15, 1996, Reg. Sess. (Cal. 1996). However, this phrase adds another layer of terminology over and above “no genuine issue” with little benefit. Also, the amendment to section 437c does not spell out what, if anything, a defendant must do to show the insufficiency of the plaintiff’s evidence. *See id.*

482. However, *A.B. 3113* would not have entirely eliminated the phrase “cannot be established” from section 437c. The bill still used this phrase in subsection (n), (“A cause of action has no merit if . . . [o]ne or more of the elements of the cause of action *cannot be separately established*”), which continued to apply to summary adjudication motions to define the phrase “has no merit” in subsection (f). § 437c(n)(1).

case lacks "sufficient substantiality."<sup>483</sup> The text merely provides that a defendant meets "his or her burden of showing that a cause of action has no merit if there is no evidence of sufficient substantiality."<sup>484</sup> This language can be interpreted as allowing the moving defendant merely to assert or "point out" to the court that the plaintiff's case lacks sufficient substantiality, instead of requiring the defendant to demonstrate affirmatively through appropriate materials that this is so.

Second, the proposed text deleted the burden-shifting language contained in section 437c(o)(2), which clarifies that the respondent's burden to show the existence of a triable issue does not shift to the plaintiff unless *and* until the court finds that the defendant has, as a threshold matter, met its movant's burden.<sup>485</sup> Without burden-shifting language, one could reasonably interpret the text to mean that the plaintiff's burden to "set forth the specific facts showing that a genuine issue of material fact exists" is quite independent of the defendant's burden and is borne by a plaintiff whether or not a defendant has met its burden. The effective elimination of the movant's burden as the trigger that shifts the burden to the plaintiff could have allowed defendants to force plaintiffs

483. A.B. 3113 as Amended in Assembly, May, 15, 1996, Reg. Sess. (Cal. 1996).

484. *Id.* To fill this void, a court would have had to interpret this passage from subsection (o)(2) in light of subsection (b), which provides that "[t]he motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, [and] depositions" in order to conclude that the moving defendant must do more than merely point out to the court the insufficiency of the plaintiff's case. *Id.*

After Assembly Bill 3113 passed the Assembly, the bill's author amended subsection (b) to change "shall" to "may." A.B. 3113 as Amended in Assembly, June 13, 1996, Reg. Sess. (Cal. 1996). Had this version of Assembly Bill 3113 become law, this change could have been construed to permit, rather than to require, the moving party to support its motion with appropriate documentation. *Id.*

485. A.B. 3113, 1995-1996 Reg. Sess. (Cal. 1996) (Legislative Counsel's Digest (Feb. 22, 1996)) (on file with author). The original draft of Assembly Bill 3113 would have affected the current text of section 437c(o)(2) as follows:

A defendant . . . has met his or her burden of showing that a cause of action has no merit if there is no evidence of sufficient substantiality to support one or more elements of the cause of action . . . . ~~Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action . . . .~~ The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a genuine issue of material fact exists but, instead, shall set forth the specific facts showing that a genuine issue of material fact exists as to that cause of action . . . .

*Id.*

to respond to unsupported summary judgment motions.<sup>486</sup> Had this provision become law, it would have tipped the balance of summary judgment procedure even more heavily in favor of defendants than does *Celotex*. *Celotex* did not establish such a bizarre structure.<sup>487</sup>

Counsel to the Assembly Judiciary Committee brought this omission to the attention of the Governor's Legal Advisor, who agreed to an amendment that restored the deleted burden-shifting language as follows: "Once the defendant . . . has met [his or her movant's burden of showing that a cause of action has no merit], the burden shifts to the plaintiff . . . to show that a genuine issue of one or more material facts exists as to that cause of action."<sup>488</sup> Assembly Bill 3113 passed the Assembly as amended.<sup>489</sup>

*b. Assembly Bill 3113 as amended (again) in the Senate Judiciary Committee: The movant's burden entirely deleted*

Once Assembly Bill 3113 passed the Assembly, a funny thing happened on the way to the Senate Judiciary Committee. While the bill was pending before that committee, the bill's author, Assembly Member Goldsmith, amended it to delete all language in subsections (o)(1) and (2) referring to the movant's burden of production.<sup>490</sup> The only language

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486. *Id.*

487. *Celotex* confirmed the continued existence of a significant movant's burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see *supra* notes 212-50. Many authors as well as Justice Brennan in his *Celotex* dissent have underscored the importance of a significant movant's burden to prevent defendants from harassing plaintiffs whom they know have some evidence to carry their burden of production at trial, by making unsupported demands for plaintiffs to preview their evidence far in advance of trial. See Friedenthal, *supra* note 240, at 776; see also Nelken, *supra* note 240, at 75.

Referring to the omission in the original draft of Assembly Bill 3113 of burden-shifting language, the bill analysis for the Assembly Judiciary Committee diplomatically states: "In addition, an amendment should be taken to make it clear that if a defendant meets its burden of proof then the burden still shifts back to the plaintiff to show that a genuine issue of material fact exists. *The author appears to have unintentionally deleted that language.*" *Analysis of A.B. 3113 Submitted to Assembly Comm. on Judiciary*, May 8, 1996, Reg. Sess. 4 (Cal. 1995-1996) (emphasis added).

488. *A.B. 3113 as Amended in Assembly*, May 15, 1996, Reg. Sess. (Cal. 1996). There is reason to believe that the bill's author reluctantly agreed to the amendment. After Assembly Bill 3113 passed the Assembly with the burden-shifting language intact, and while it was pending before the Senate Judiciary Committee, the bill was again amended to delete entirely the burden-shifting language in subsection (o). See *A.B. 3113 as Amended in Senate*, June 13, 1996, Reg. Sess. (Cal. 1995-1996).

489. *Analysis of A.B. 3113 Submitted to Senate Comm. on Judiciary*, Aug. 7, 1996, Reg. Sess. (Cal. 1995-1996).

490. The author also amended section 437c(b) to change the provision that the motion "shall be supported by affidavits, declarations, admissions, answers to inter-

that remained in the text of subsection (o) after the deletion was the definition of the respondent's burden:

For purposes of motions for summary judgment and summary adjudication the nonmoving party may not rely upon the mere allegations or denials of its pleadings to show that a genuine issue of fact exists but, instead, shall set forth the specific facts showing that a genuine issue of material fact exists as to the cause of action or defense at issue in the motion.<sup>491</sup>

The author of the bill, Assembly Member Goldsmith, gave the following explanation to the Senate Judiciary Committee for the deletion:

As it currently reads, CCP 437c(o)(1) and (2) imply the moving party has the burden of negating the claim or defense of any nonmoving party bearing the burden of proof. *Celotex* has clarified that is not the law under Federal Rule 56.

To conform to the Federal standard, CCP 437 (o)(1) and (2) are deleted, retaining one sentence providing the allegations of a pleading alone cannot create a genuine issue of material fact, and further clarifying that the moving party does not have the burden of negating the claim or defense of any nonmoving party bearing the burden of proof.<sup>492</sup>

In response to the deletion of the movant's burden, the Civil and Small Claims Advisory Committee of the Judicial Council recommended that the Judicial Council formally oppose the bill.<sup>493</sup> The bill analysis submit-

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rogatories, depositions, and matters of which judicial notice shall or may be taken" from a mandatory requirement to merely permissive. See A.B. 3113, 1995-1996 Reg. Sess. (Cal. 1996) (Legislative Counsel's Digest) (on file with author). The purpose of this amendment was to enact *Celotex's* holding that, in defensive summary judgment motions, moving defendants are not required to submit affirmative evidence like affidavits to support the motion. BACKGROUND INFORMATION REQUEST, SENATE JUDICIARY COMMITTEE, MEASURE: A.B. 3113, AUTHOR: GOLDSMITH (on file with author). Through unartful drafting, however, the switch from "shall" to "may," covering all documentary support for the motion—not just affidavits—could be interpreted as making the submission of *any* supporting documentation optional. See *Analysis of A.B. 3113 Submitted to Senate Comm. on Judiciary*, Aug. 7, 1996, Reg. Sess. 6 (Cal. 1995-1996) ("This bill not only allows the permissive use of affidavits, but also everything else which includes declarations, admissions, answers to interrogatories, etc. This is clearly not in conformance with the *Celotex* case."); see *supra* note 239 and accompanying text (discussing the Supreme Court's requirement in *Celotex* that the moving party identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact") (quoting FED. R. CIV. P. 56(c)).

491. A.B. 3113 as Amended in Assembly, June 13, 1996, Reg. Sess. (Cal. 1996).

492. BACKGROUND INFORMATION REQUEST, SENATE JUDICIARY COMMITTEE, MEASURE: A.B. 3113, AUTHOR: GOLDSMITH (on file with author).

493. The recommendation of the Civil and Small Claims Advisory Committee would have been transmitted to the Policy Coordination and Liaison Committee for a vote on whether the Judicial Council should send a formal letter in opposition to the

ted to the Senate Judiciary Committee made the following comment about the deletion:

Despite where the confusion lies, this bill completely eliminates all language dealing with the burden of production leaving courts to interpret the disarray. If the authoros [sic] intent is to clarify the nonmoving party's burden of production, this bill would appear not to meet its purpose.<sup>494</sup>

The Senate Judiciary Committee voted down Assembly Bill 3113 because it was a partisan attempt to enact part of the Governor's civil justice reform agenda. It was doomed from the outset to flounder in the Democrat-controlled Senate after sailing through the Republican Assembly. One lesson for the legislative primacy rulemaking model is that partisan procedure can become a casualty of legislative gridlock. The tortuous progress of Assembly Bill 3113 through the legislature also reveals a rulemaking process that is not characterized by "considered deliberation."<sup>495</sup>

2. Assembly Bill 3113 is also "Bad" Summary Judgment Law on the Merits

Even if Assembly Bill 3113 accurately captured the essence of *Celotex's* holding, the bill is "bad" procedure on its merits. *Celotex* and the rest of the trilogy have been strongly criticized for tilting the playing field in favor of repeat-player defendants.<sup>496</sup> Assembly Bill 3113 also fits

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Senate Judiciary Committee. Telephone Interview with Carrie Cornwell, Legislative Policy Analyst, California Judicial Council (Aug. 20, 1996). Before the Policy Coordination and Liaison Committee could vote on the recommendation, Assembly Bill 3113 had been rejected by the Senate Judiciary Committee, making the matter moot. *Id.*

494. *Analysis of A.B. 3113 Submitted to Senate Comm. on Judiciary*, Aug. 7, 1996, Reg. Sess. 13 (Cal. 1995-1996).

495. See *supra* note 176 (discussing the testimony of Judge Robert F. Peckham before the Senate Committee on the Judiciary and criticizing the adverse impact of the Civil Justice Reform Act of 1990 on the federal rulemaking process).

496. See Stempel, *supra* note 131, at 161-62. Stempel writes:

By making summary judgment easier to obtain, the Court implicitly bestowed a political favor (and greater judicial power) on litigants who can make most use of the motion. Defendants use the motion more than plaintiffs. Defendants are disproportionately comprised of society's 'haves': banks, insurance companies, railroads, business organizations, governments, and government agencies.

Since rules of procedure are, insofar as possible, supposed to be neutral in their impact on litigants, a change in any procedural rule should be justified by evidence that the rule needs to be changed to correct an unfair imbalance or that a current neutral balance is unwise. No such case was made prior to the *Liberty Lobby* holding.

*Id.*

Jack B. Weinstein, a federal district court judge, referring to the trilogy, commented that "[t]he counter-revolution already has established a beachhead in our highest court. Professor Coffee overstates it, but makes a point with some merit

squarely within the "restrictive access" paradigm.<sup>497</sup> This bill would have denied access to less favored claims and politically and economically powerless plaintiffs.<sup>498</sup> Viewed in this way, Assembly Bill 3113 would have undermined the goal of party-neutrality.<sup>499</sup> It also would have transformed the function of summary judgment from a pretrial device to screen out cases that are not trial-worthy to a trial itself: a "mini-trial" on paper evidence.<sup>500</sup> This transformation is part of the "currently trendy drive toward efficiency" at the expense of accuracy.<sup>501</sup>

Assembly Bill 3113's proponents argued that the bill would have "ma[d]e it easier for litigants to dispose of frivolous claims before trial and would reduce litigation costs."<sup>502</sup> The "reformed" summary judgment procedure, however, would have gone beyond merely eliminating cases "in which the claimant has 'no case at all'" to give the judge unprecedented power to "dismiss claims in which the claimant's case ap-

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when he writes: 'a series of recent Supreme Court decisions seem to have the one common denominator that the plaintiff's attorney always loses.'" Weinstein, *supra* note 116, at 1919 (quoting John C. Coffee, Jr., *No Exit?: Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 920 n.2 (1988)); see also Gordillo, *supra* note 198, at 277.

497. See *supra* notes 107-23 and accompanying text. Assembly Bill 3113 was part of Governor Wilson's "civil justice reform" package designed to speed up disposition of cases and cut litigation costs. See *supra* notes 465-68 and accompanying text. The Governor's press release echoed the themes of the Quayle Report, including the adverse impact of escalating litigation costs on the competitiveness of California businesses. Also included in the civil justice reform package was a proposal to raise the municipal court jurisdictional limit from \$25,000 to \$50,000. This proposal would have forced cases with more substantial damage claims into municipal court with its expedited procedures. Governor Wilson's civil justice reform package also proposed early mediation for all cases. See *supra* note 465. Press Release, *Governor Unveils New Tort Reform Proposals*, 1, 2 (Mar. 5, 1996).

498. Professor Stempel states that the Supreme Court's "message" to lower federal courts in *Liberty Lobby* and *Matsushita* was "to trim weak or otherwise disfavored cases from the trial docket," and he predicts "[t]he observed and coming change in summary judgment jurisprudence bodes ill for certain classes of litigants, persons interested in the accuracy of judicial decision making, and the system as a whole." Stempel, *supra* note 131, at 159; see also Weinstein, *supra* note 116, at 1907 (observing that free access to courts is the "controversy that surrounds us today").

499. See Stempel, *supra* note 131, at 159.

500. Childress, *supra* note 201, at 184.

501. See Stempel, *supra* note 131, at 193 (noting the "currently trendy drive toward efficiency"); see also *id.* at 172-81 (analyzing the increased potential for erroneous dismissals under the trilogy's summary judgment standards).

502. *Analysis of A.B. 3113 Submitted to Assembly Comm. on Judiciary*, May 8, 1996, Reg. Sess. 2 (1995-1996).



pears weak in the eyes of the judge."<sup>503</sup> The trilogy permits the court to assess the persuasiveness of the plaintiff's case, rather than determine the existence of a factual dispute to warrant trial, and does so prematurely based on paper evidence before the case can develop with live witnesses testifying before a jury.<sup>504</sup> Assembly Bill 3113's use of the phrase "no evidence of *sufficient substantiality*" to define when a cause of action "has no merit" highlights the foregoing point.<sup>505</sup> This phrase would have been an invitation to courts to weigh the evidence. Traditional summary judgment law prohibited courts from weighing the evidence.<sup>506</sup>

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503. Stempel, *supra* note 131, at 140 (quoting Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578 (1952)). For a "post-trilogy review of lower court decisions," see Issacharoff & Loewenstein, *supra* note 207, at 88-89. Issacharoff and Loewenstein assert:

A post-trilogy review of lower court decisions reveals a widespread and dramatic recasting of summary judgment doctrine by the lower courts. This is clearly evident in the revision of the movant's burden in light of *Celotex* and in the eased standards for the grant of summary judgment evident in *Anderson* and *Matsushita*. Courts have shown a new willingness to resolve issues of intent or motive at the summary judgment stage and, in the extreme version, to grant summary judgment where "taken as a whole, [plaintiffs' evidence does not] exclude other reasonable hypotheses with a fair amount of certainty. . . ."

There is evidence in the post-trilogy case law that summary judgment has moved beyond its originally intended role as a guarantor of the existence of material issues to be resolved at trial and has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial.

*Id.* (quoting *Bovillion v. Eli Lilly & Co.*, 677 F. Supp. 467, 471 (W.D. La. 1988); *Norris v. Bell Helicopter Teltron*, 495 So. 2d 976, 982 (La. Ct. App. 1986)); see also Carrington, *supra* note 44, at 2093; Gordillo, *supra* note 198, at 280.

504. Stempel, *supra* note 131, at 140; see also Issacharoff & Loewenstein, *supra* note 207, at 87.

505. See *supra* note 481 and accompanying text.

506. Stempel, *supra* note 131, at 166.

[Before the trilogy], the judge had to wait until at least mid-trial before her excursion into what many regarded as jury territory could begin. By deciding, before full development of the record at trial, that the nonmovant's side of a disputed factual story is not sufficiently probative to support a verdict by a reasonable jury, the judge can more easily eliminate not only claims that she finds unpersuasive in the instant case but also legal rights with which she is unsympathetic.

*Id.* For an example of a recent federal case in which the district court used summary judgment to dismiss a case that the court found unpersuasive, see *Visser v. Packer Eng'g Assocs.*, 924 F.2d 655 (7th Cir. 1991) (en banc). In *Visser*, the plaintiff claimed his employer terminated him because of age discrimination in violation of the Age Discrimination in Employment Act. *Id.* at 660. The district court granted defendant's motion for summary judgment based upon its evaluation of the plaintiff's case on intent as insufficient to create a genuine issue for trial. *Id.* Summary judgment

#### IV. THE IMPLICATIONS OF THE SUMMARY JUDGMENT SAGA FOR CALIFORNIA'S LEGISLATIVE PRIMACY RULEMAKING PROCESS: BAD PROCESS PRODUCES BAD PROCEDURE

##### A. General Observations

This Article reveals two major points. First, California's summary judgment law needs to be reformed, if not completely overhauled. Second, and more fundamentally, the very process for drafting the rules of civil procedure in California also needs reform.

California's summary judgment saga reveals how a procedural issue with powerful political resonance, which has vocal support and opposition by interest groups both ideological and pecuniary, fares in the rough-and-tumble reality of the legislative primacy rulemaking process. Summary judgment reform is an item on the agendas of several interest groups. At the federal level, it has been on the agenda of "reformers" who oppose the "open access" paradigm and seek to speed up the disposition of cases by restricting access to the formal litigation system.<sup>507</sup> In

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ment was upheld on appeal over the dissent of three judges. *Id.* at 660-64. The three dissenting judges believed that the plaintiff's affidavits showed that he had enough evidence to make out a prima facie case of age discrimination and meet his burden of production at trial. *Id.* at 662-64 (Flaum, J., dissenting). Like the plaintiffs in *Celotex*, *Liberty Lobby*, and *Matsushita*, Visser had a case, but one that a majority of the court of appeals judges found unpersuasive. *Visser* is an example of the "new willingness to resolve issues of intent or motive at the summary judgment stage." See Issacharoff & Loewenstein, *supra* note 207, at 88-89.

507. Judge Weinstein includes in his list of "change after change in procedure [that] has been designed to reduce access to the courts on the ground of abuse: Summary judgment—usually against plaintiffs—[which] has been expanded." Weinstein, *supra* note 133, at 831-32; see also Stempel, *supra* note 131, at 193 (implying that the Supreme Court's expansion of summary judgment in the trilogy is part of the "currently trendy drive toward efficiency").

The "Agenda for Civil Justice Reform in America" included among its recommendations "mandatory summary judgment" and a requirement that the courts of appeals give trial judges greater discretion in determining whether a "genuine issue of material fact exists." President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* (1991), reprinted at 60 U. CIN. L. REV. 979, 990, 998 (1992).

The Sourcebook of American State Legislation of the American Legislative Exchange Council, a conservative think-tank, also contains recommendations for expanding summary judgment. AMERICAN LEGISLATIVE EXCH. COUNCIL, 1 SOURCEBOOK OF AMERICAN STATE LEGISLATION pt.II 86-87 (1995). Assembly Bill 3113 was offered by Governor Wilson as part of a package of "civil justice reform" proposals. See *supra* note 465.

California, some form of expanded summary judgment has also been part of the reform agenda of the "anti-access movement,"<sup>508</sup> which has had a major impact on California's judicial reform.<sup>509</sup> Thus, as a matter of ideology, many in the judiciary and in academia support some form of more potent summary judgment procedure to clear court dockets by avoiding "unnecessary" trials. This belief in summary judgment as a docket management device explains the *initial* support given by the Judicial Council to the version of Assembly Bill 3113 that passed the Assembly.<sup>510</sup>

Summary judgment, however, is also on the political or substantive agenda of groups with a partisan or pecuniary ax to grind. Republicans, conservatives, manufacturers and other business interests, defense lawyers, and tort reform advocates routinely support proposals making it easier for defendants to win summary judgment motions.<sup>511</sup> These same proposals are on the legislative hit list of the American Trial Lawyers Association.<sup>512</sup> Summary judgment is a prime example of highly politicized procedure. As such, it has become a partisan issue in California with special interest groups squaring off against each other in the legislature, the courts, and practice commentaries.<sup>513</sup>

Those who support a more vigorous summary judgment for pecuniary or partisan advantage<sup>514</sup> and those "reformers" who support it on ideological grounds<sup>515</sup> do not necessarily agree on what form the reform should take. For example, the Judicial Council withdrew its initial sup-

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508. Weinstein, *supra* note 133, at 1907.

509. Professor Scheiber has observed that California has not been immune from the reform movement characterized by Professor Stempel as the restrictive access paradigm:

The movement for enhanced judicial control over litigation has enjoyed extraordinary success. In the federal courts and in many states, including California, the trial of facts and the process of judgement in open court has been robustly challenged as the central element of litigation by a model of adjudication that incorporates mandated negotiation as an integral part, for many types of cases the central part, of the process leading to disposition.

Scheiber, *supra* note 33, at 2107.

510. In addition to the ideological interest of improving the judicial system, support by some judges for a strengthened summary judgment procedure may also be motivated by the self-interest of achieving a more manageable workload.

511. See *supra* notes 124-27 and accompanying text.

512. See *supra* notes 128-32 and accompanying text.

513. See Mullenix, *supra* note 82, at 795. "It should not be surprising that partisan politics informs legislative rulemaking, but more curious is the incursion of such partisan tactics into the inner workings of judicial rulemaking." *Id.* at 851.

514. See *id.* at 851.

515. See Stempel, *supra* note 131, at 190-91. "Unlike the reformers who sought to merge law and equity, establish discovery, and supplant code pleading with notice pleading, the summary judgment revolutionaries prevailed without firing a legitimately debated 'shot' in a conflict conducted under proper Enabling Act procedure." *Id.*

port for Assembly Bill 3113 when the Senate Judiciary Committee deleted the statutory provisions requiring a movant's burden.<sup>516</sup>

California's summary judgment saga teaches several lessons about the legislative primacy rulemaking process. Whatever the merits of a more liberal summary judgment procedure, when the legislature serves as the decision-making arena for the formulation of court procedure, any deliberative, careful, informed consideration of the merits suffers severely. The absence from the deliberative process of persons with expertise in procedure, and the presence of political logrolling in the rules formulation process, creates procedural rulemaking chaos. The resulting statutory product is a patchwork of poorly drafted provisions, which neglects the public interest in a coherent, fair, and efficient judicial system and in simple, flexible, and well-drafted procedural rules.

### *B. The Saga's Particular Lessons*

#### 1. The "Code" Tradition of Legislative Rulemaking Leads to Overly Detailed and Amended Statutory Procedure

California's summary judgment statute is poorly drafted, overly detailed, laden with ambiguous terms, and confusing. These statutory defects are the result of the enactment, over the years, of layer upon layer of patchwork amendments and is typical of the "code" tradition of legislative rulemaking.<sup>517</sup> One consequence is bad case law, typified by *Union Bank*, as courts try to make sense out of confusing statutes<sup>518</sup> or, worse, use badly drawn statutes as an opportunity to grind a jurisprudential ax. Rather than attempting to engraft *Celotex* onto the existing summary judgment statute, the legislature should have started over, completely overhauling and simplifying the statute.<sup>519</sup> The best candidate for overhauling not only the summary judgment law, but the entire civil pro-

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516. See *supra* note 493 and accompanying text.

517. See Jeffrey J. Coonjohn, *A Brief History of the California Legislative Counsel Bureau and the Growing Precedential Value of its Digests and Opinions*, 25 PAC. L.J. 211, 216 (1994) (describing the California Legislature's practice of "churn[ing] out ill-conceived and poorly drafted statutes while simultaneously calling for corrections under the guise of 'revision and reform'").

518. In commenting upon the code system's adverse impact on procedural case law in California, Chief Justice Gibson observed in 1957 that "[u]nder the code system we constantly resort to judicial construction to make statutes workable and to fit them into situations which were not clearly contemplated by their draftsmen." Gibson, *supra* note 70, at 730.

519. See *supra* note 287 (describing the California Judges Association's support for this assertion).

cedure code, is the Judicial Council.<sup>520</sup>

## 2. The Legislative Primacy Process is "Uninformed" About Procedure

Most legislators lack sufficient litigation experience to understand complex procedural issues. Few, if any, of the members of the Assembly Judiciary Committee that voted in favor of Assembly Bill 3113 had extensive experience with civil litigation. At the time the Assembly Judiciary Committee voted Assembly Bill 3113 onto the floor of the Assembly, only four of the committee's fifteen members were lawyers, and this group's shared litigation experience is not extensive.<sup>521</sup> There were more "lawyer" members of the Senate Judiciary Committee that rejected Assembly Bill 3113, but like the assembly members who accepted it, the hands-on civil litigation experience shared by these attorneys was thin.<sup>522</sup> It is difficult to believe that most of these judiciary committee members who played such a key role in formulating summary judgment law could understand the intricacies of the movant and respondent's burdens and their relation to *Celotex*.

Prolonged service on a legislative judiciary committee might mitigate the committee members' lack of practical litigation experience. However, of the Assembly Judiciary Committee's fifteen members as it existed in the spring of 1996, seven members had served only two years, two had served three years, five had served four years and only one had served six years.<sup>523</sup> Term limits, which will prevent legislators from sitting on a

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520. See *infra* notes 550-59.

521. Committee Chair Bill Morrow, a Republican, was a United States Marine Corps officer, judge advocate, and chief trial counsel at Camp Pendleton. CALIFORNIA POLITICAL ALMANAC, *supra* note 469, at 266-68. Democrat Debra Bowen's practice specializes in environmental issues. *Id.* at 198-99. Republican Howard Kaloogian's practice centers on probate, trusts, and taxes. *Id.* at 231-32. Jan Goldsmith was a professional mediator and arbitrator (1981-1992), an adjunct instructor in negotiation and mediation at University of San Diego Law School (1987-1989), and served as judge pro tem. *Id.* Three out of the four lawyer-members, including Democrat Debra Bowen, voted in favor of releasing Assembly Bill 3113 to the Assembly floor. A.B. 3113, Votes-Roll Call in Assembly Committee on Judiciary (on file with author). Kaloogian is listed as "absent, abstaining or not voting." *Id.*

522. Senator Charles Calderon, a Democrat, was a former city attorney prosecutor. *Id.* at 116-18. Senator Ray Haynes, a Republican, is free counsel for Western Center of Law and Religious Freedom. *Id.* at 291. Senator William Lockyer, a Democrat, is not listed in Martindale-Hubbell nor is there any reference to his practice in the California Political Almanac. See *id.* at 149-50. However, that book describes Democrat Senator Nicholas Petris as "a vocal champion of the state's influential trial lawyers, standing against all efforts to tighten the state's 'deep pockets' tort liability laws, efforts he sees as victimizing consumers." *Id.* at 164-65. Senator Byron Sher, a Democrat, is a Stanford law professor. *Id.* at 279-81.

523. See *id.*

judiciary committee long enough to develop a familiarity with procedural issues, will exacerbate this lack of rulemaking wisdom.

Also missing from the legislative rulemaking process are well-researched empirical studies of proposed rules to determine whether there were problems with the statute, what those problems were, and whether each proposed rule change would provide a solution. The natural source of such data would have been the Judicial Council, which has a well-developed research staff in the Administrative Office of the Courts.<sup>524</sup> However, when the legislature tosses proposed amendments to the Council for appraisal, the Council generally does not have sufficient time to develop an in-depth workup.<sup>525</sup> This lack of sufficient response time provides some explanation as to why the Judicial Council did not provide the Assembly Judiciary Committee with any studies. The Council sent only a brief letter in support of the version of Assembly Bill 3113 that ultimately passed the Assembly, with no real analysis of the pros and cons of the proposed amendment.<sup>526</sup>

Legal scholars and practitioners did little to inform the debate over the 1992 and 1993 amendments and Assembly Bill 3113. The local literature made no attempt to give perspective and context to the summary judgment issue by importing into the California summary judgment debate

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524. See Stolz & Gunn, *supra* note 34, at 886 n.63 and 890-91; Scheiber, *supra* note 33, at 2081, 2083-84. This staff produces such studies when the Judicial Council considers one of its own proposals to change a rule of court. Telephone Interview with Carrie Cornwell, Legislative Policy Analyst, California Judicial Council (July 25, 1996).  
525. Telephone Interview with Carrie Cornwell, Legislative Policy Analyst, California Judicial Council (July 25, 1996).

526. Letter from Carrie Cornwell, Legislative Policy Analyst, California Judicial Council to Assembly Member Morrow, Assembly Judiciary Committee (April 8, 1996) (on file with author). After noting that Assembly Bill 3113 "adopts in state statute the federal standard for granting summary judgment," the Judicial Council's letter makes the following observations:

Summary judgment at the federal level forces parties to prove their cases earlier because the defendant shifts the burden to the plaintiff after showing that there is an absence of evidence to support the nonmoving party's case. The council, therefore, believes that this bill by strengthening summary judgment in state courts will promote early settlement and eliminate those cases with no merit.

*Id.*

It is, of course, arguable that even had the committee members been presented with a thorough and well-researched study, most members would not have had the requisite familiarity with procedure generally, and of summary judgment in particular—nor the time or inclination—to digest its contents.

the scholarly dialogue in law reviews across the nation regarding the wisdom of the Supreme Court's expansion of summary judgment. There has been no examination of the post-trilogy federal case law to determine how deep the new version of summary judgment cuts. There has been no exploration of the place for summary judgment in the larger adjudicatory system through an honest assessment of the competing visions or paradigms of adjudicatory procedure vying for dominance. California legal academicians have a unique contribution to offer to the development of California procedure by providing depth and perspective to the dialogue over procedural issues, and some coherence to a judicial system buffeted by change. The legislative primacy rulemaking model does not encourage this scholarly contribution. In contrast to the legislative primacy model, the Federal Advisory Committee actively invites scholarly input into rules formulation. The membership of the Federal Advisory Committee includes academicians, and the reporter for each committee is usually a law professor.<sup>527</sup>

California's legislative rulemaking process relies heavily upon the work of the counsel assigned to each judiciary committee to synthesize the arguments in support of and in opposition to a bill, to scrutinize text for drafting defects, and to analyze the impact of the proposed amendment on existing law.<sup>528</sup> Careful scrutiny by counsel to the Assembly Judiciary Committee of the draft of Assembly Bill 3113, as originally proposed by the Governor's office, disclosed the omission in the text of a provision for shifting the movant's burden to the respondent, as well as the failure to change all references from "triable issue" to "genuine issue."<sup>529</sup> The assigned counsel bases his analysis of the merits largely on the partisan input of supporters and opponents of that bill, and whatever independent research he can perform.<sup>530</sup> No matter how competent counsel happens to be, the work of one lawyer, whose job is dependent upon the goodwill of the party in power, is no substitute for careful, collective, and neutral deliberation.

### 3. The Legislative Primacy Process is "Political"

Summary judgment has become an intensely political issue. Once the legislature raised the red flag of *Celotex* as the avowed purpose of As-

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527. See Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 329 (1991). Perhaps part of the explanation for the dearth of scholarly input into the summary judgment dialogue lies in the low level of scholarly interest in California procedural issues.

528. Telephone Interview with Cliff Zall, Counsel, Assembly Judiciary Committee (July 25, 1996) [hereinafter Telephone Interview with Cliff Zall].

529. See *supra* notes 476, 487.

530. See Telephone Interview with Cliff Zall, *supra* note 528.

sembly Bill 3113, support for and opposition to the bill became a highly partisan matter. The vote in the Assembly Judiciary Committee and on the assembly floor broke almost completely along party lines.<sup>531</sup> In the Judiciary Committee, all but one of the committee members who voted to release Assembly Bill 3113 to the assembly floor were Republicans.<sup>532</sup> All but one of the Democrats on the committee either abstained or were absent from the hearing at which the vote was taken.<sup>533</sup> On the assembly floor, Republican legislators accounted for forty of the forty-one votes that passed Assembly Bill 3113.<sup>534</sup> Democrats accounted for all thirty-two votes opposing the bill.<sup>535</sup>

From the partisan nature of the vote on Assembly Bill 3113, as well as the lack of informed, neutral-sourced input on this technical procedural matter, it seems fair to infer that the political affiliation of the legislators determined their vote more than did a careful, informed decision on the merits.<sup>536</sup>

Legislative rulemaking is a non-neutral process that is likely to produce non-neutral rules of procedure. Legislators are directly subject to special interest group and party leadership pressure.<sup>537</sup> Assembly Bill 3113

531. See A.B. 3113, Votes-Roll Call on Assembly Floor; A.B. 3113, Votes-Roll Call in Assembly Judiciary Committee (on file with author).

532. See A.B. 3113, Votes-Roll Call in Assembly Judiciary Committee (on file with author). Debra Bowen, a Democrat from the 53rd Assembly District, was the only Democrat on the committee to vote in favor of Assembly Bill 3113. See *id.* Bill Kalogian, a Republican, was either absent or abstained. *Id.*

533. See *id.*

534. See A.B. 3113, Votes-Roll Call on Assembly Floor (on file with author).

535. See *id.* It is interesting to note that Assembly Member Debra Bowen, the Democratic Vice-Chair of the Assembly Judiciary Committee who provided the lone Democratic vote in favor of releasing Assembly Bill 3113 to the Assembly floor, was either absent, abstained, or did not vote on the bill when it actually reached the Assembly floor. See *id.* Only one Democrat and one Republican crossed party lines; Cortese, a Democrat, voted in favor of A.B. 3113 while Setencich, a Republican voted against. See *id.*

536. The fact that a fortified summary judgment is part of the "civil justice agenda" of Governor Wilson, the Quayle Report, and the package of "model" legislation proposals distributed to state legislators nationwide by the conservative American Legislative Exchange Council suggests that harried conservative legislators vote the entire agenda. See *supra* notes 107-32 and accompanying text.

537. See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporaneous Crisis*, 27 STAN. L. REV. 673 (1975). Professor Friedenthal notes:

The legislative process seems particularly unsuited both to wholesale reform of court procedures and to technical adjustment of specific regulations. . . . [L]egislators, even when sensitive to the need for reform, are often influenced



seems to have suffered from the "shoot from the hip" and "draft first and ask questions later" propensities of legislators.<sup>538</sup> The result was a piece of poorly drafted, ill-considered procedural legislation.

Furthermore, due to the heightened partisan interest in summary judgment and the split control of the legislature between Democrats and Republicans,<sup>539</sup> resolution of the current confusion in summary judgment law will be held hostage to legislative gridlock. The legislative rulemaking process does not foster forthright and candid assessment of procedural bills that are perceived to have significant political implications. Commentators have criticized reformers for packaging substantive proposals, aimed at advancing the financial interests of repeat players, as civil justice reform measures that benefit everyone.<sup>540</sup>

*The Saga of Summary Judgment* also illustrates how poorly drafted procedural statutes produced by the legislative primacy process can invite flawed case law as courts attempt to interpret these statutes.<sup>541</sup> The *Union Bank* episode illustrates how reformers were able to leverage ambiguities in the summary judgment statute and confused legislative history to achieve in the court of appeal a transformation of summary judgment procedure unachievable in the legislature due to the powerful opposition of the trial lawyers' lobby.

Reformers set the stage for *Union Bank* by advancing their views on summary judgment in law reviews and practice commentaries. For example, Judge Pollak pressed for a *Celotex*-type approach to California summary judgment before the Supreme Court decided *Celotex*.<sup>542</sup> Additionally, the campaign in the commentaries for a stronger summary judgment procedure gathered momentum following the trilogy.<sup>543</sup> A few writers suggested that the courts could do the job, rather than the legislature.<sup>544</sup>

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by special interest lobbyists, including members of various elements of the bar itself. Such lobbyists may pressure legislators to alter crucial parts of a proposed reform bill, thereby limiting or destroying its overall effectiveness.

*Id.* at 673.

538. See Stempel, *supra* note 55, at 742-43.

539. See *supra* note 8 (noting that the Democrats regained control of the Assembly in the November 1996 election, but only by a "paper thin" majority).

540. See *supra* note 120 and accompanying text.

541. See *supra* notes 65-67 (discussing the comments of Chief Justice Phil Gibson) & 518.

542. Pollak, *supra* note 209, at 419.

543. See, e.g., Dowling, *supra* note 307, at 493; Curtis Karnow, *Follow the Federal Lead on Summary Judgment*, CAL. LAW., Dec. 1989, at 33; Mitchell, *supra* note 240, at 29.

544. Dowling, *supra* note 307, at 510 ("The necessary evolution can occur through judicial action without additional legislative reform."); Mitchell, *supra* note 240, at 29-30 ("The California courts can and should interpret Code of Civil Procedure Section

As early as 1989, the most influential of these commentators, Weil and Brown, urged that California follow the federal lead in summary judgment.<sup>545</sup> After the enactment of the 1992 amendment to section 437c, but before any case law interpretation of that amendment, Weil and Brown stated that "[t]he 1992 amendments represent a significant departure from former law" and that the legislature intended "to adopt the federal standards governing burden of proof on summary judgment motions as expressed in [*Celotex*]."<sup>546</sup> One commentator predicted that Weil and Brown's interpretation of the 1992 amendment "may also become a self-fulfilling prophecy, because the Weil and Brown practice guide has been cited by California appellate courts as a 'leading treatise.'"<sup>547</sup> Weil and Brown read *Union Bank* expansively,<sup>548</sup> despite the court's deliberately narrow holding.<sup>549</sup>

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437c in a way to accomplish [the same purposes as *Celotex*].").

Mitchell, *supra* note 240, at 32 ("If the California courts are interested in resolving court congestion and reducing the backlog of cases waiting for trial, they should be willing to take a more realistic approach to summary judgment.") Karnow, *supra* note 296, at 1885-86. ("Those pining for a change in California's summary judgment law have suggested amendments to the statute. But problems in the law heretofore are the byproduct of judges, not legislators; and judges have the power to change the law.") *Id.*

545. ROBERT I. WEIL & IRA A. BROWN, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 10:115.4 (1989).

There is much to be said for the federal rule. The California rule places no burden on the opposing party until the moving party negates the opposing party's claim or defense (at which point, the opposing party can avoid summary judgment simply by showing a single triable issue of fact. . . .). The federal rule enables the moving party to force the other side to "reveal its hand." If the opposition has no evidence on an essential element of its case, or its evidence consists of inadmissible hearsay or opinions, this will be disclosed early on rather than having to wait until the time of trial!

*Id.* § 10:227.

546. WEIL & BROWN, *supra* note 296, § 10.237.

547. Thomas, *supra* note 296, at 7. It should be noted that the *Union Bank* decision did not cite Weil and Brown to support its interpretation of the 1992 and 1993 amendments. See *Union Bank v. Los Angeles County Superior Court*, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

548. See *supra* notes 425-28 and accompanying text.

549. See *supra* notes 430-33 and accompanying text.

C. *The Judicial Council, Supported by a Standing Advisory Committee, Should Promulgate All Rules of Civil Procedure*

Vesting the Judicial Council with complete rulemaking power would be a substantial improvement over legislative rulemaking; it would not, of course, be a panacea for all the ills plaguing the rulemaking process. This Article proposes that the Judicial Council serve a rulemaking function similar to the Judicial Conference of the United States. A standing advisory committee on the civil rules, operating within the Judicial Council, would do the work of drafting proposed rules for ultimate approval and promulgation by the Council, subject to legislative veto. The advisory committee would consist of a balanced cross-section of the bench, bar, and academia.<sup>550</sup> Additionally, this Article proposes that the membership of the Judicial Council itself be diversified to include procedural scholars in addition to the existing membership drawn from the bench and bar.

The Judicial Council, of course, is not immune from the political forces that buffet the rulemaking process in the legislature.<sup>551</sup> Even the federal judiciary, with appointed, life-tenured judges, is not immune from the political influence of the presidents who appoint those judges.<sup>552</sup> In California, the election of judges, who occupy most of the seats on the Judicial Council, increases the vulnerability of rulemaking in the Council to political influence.

However, federal experience demonstrates that despite the recent onslaught of lobbyists, the neutral perspective of the advisory committee process remains intact.<sup>553</sup> The Advisory Committee's adherence to the

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550. The Advisory Committee on Civil Rules consists of two circuit court judges, three district court judges, one United States magistrate, one state court justice, one Justice Department attorney, two practitioners, and two law professors. *See* Mullenix, *supra* note 82, at 797 n.2. The Judicial Improvements Act of 1988, as originally drafted, proposed that the Advisory Committees "consist of a balanced cross section of the bench and bar, and trial and appellate judges," but this provision was eliminated from the final legislation. *Id.* at 832.

551. The impact of the politicization of procedure on federal rulemaking has not been confined to Congress. Since the 1988 amendments to the REA opened up the Advisory Committee's rulemaking process to wider public participation, special interest groups have actively lobbied the Advisory Committee. For a summary of the specific ways in which the Judicial Improvements Act of 1988 has made the Advisory Committee's rulemaking process more public, see *id.* at 832.

552. *See supra* notes 107-23 and accompanying text (discussing the Quayle Report).

553. Marcus, *supra* note 44, at 816. Marcus explains:

[R]eformers can be moved by more than the self-interest of the loudest or best-financed supplicant, and this is the orientation the Advisory Committee has assumed. Despite the controversy surrounding some of the recent proposals, there is no significant indication that the proposals themselves reflect the

goal of neutrality amidst the political tempest provides good reason to expect that the Judicial Council will approach its expanded rulemaking duties with the same good-faith objective of drafting procedurally neutral rules.

It should be noted that the Advisory Committee has been the subject of some criticism recently,<sup>554</sup> but one need not throw the baby out with the bathwater.<sup>555</sup> There is certainly room to improve the process, and commentators have floated a variety of proposals motivated by the common desire to preserve the key role of the judiciary in federal

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importuning, as such, of those who might be affected.

*Id.*

The increased accessibility of the Advisory Committee to interest group lobbying has not aroused concern that the committee will lose its neutral perspective. To the contrary, Professor Mullenix is concerned that, as procedure becomes politicized, the Advisory Committee will abdicate more rulemaking authority to Congress to avoid tangling with political issues. Mullenix, *supra* note 82, at 837. Ultimately, Professor Mullenix fears that "the Advisory Committee will become insignificant in the rulemaking process" as interest groups move on to Congress for satisfaction. *Id.*

554. Scholarly commentary has criticized the Advisory Committee for acting intuitively and precipitously, without sufficient deliberation based upon empirical data. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1443 (1994) (discussing criticism by Supreme Court Justices Scalia, Thomas, and Souter on the Advisory Committee's attempts to amend federal civil discovery); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 314 nn.3-4 (1992) (discussing empirical studies on the controversy surrounding Rule 11 and the Advisory Committee). In this regard, the problems surrounding the 1983 amendment to Rule 11 and the addition of mandatory disclosure to conventional discovery under Rule 26 have drawn the most criticism. See Burbank, *supra* note 183, at 844-48 (discussing the implications of the 1983 amendments to Rule 11 and the 1993 amendments to Rule 26); Mullenix, *supra* note 82, at 837 (commenting on the impact of the Advisory Committee's newly proposed informal discovery rules and procedures); Stempel, *supra* note 55, at 740 n.278 ("The adoption and subsequent modification of Rule 11 reveals a shoot-from-the-hip rulemaking process in which insiders quietly but quickly decided to 'do something' about a perceived problem with frivolous litigation."); Walker, *supra* note 82, at 489 (proposing a shift in the process of committee rulemaking from deductive to inductive reasoning based upon empirical data in order "to preserve judicial expertise as a starting point for rulemaking"). But see Marcus, *supra* note 44, at 824 ("Far from stirring up trouble to justify its existence, the Advisory Committee appears in many ways a stable and cautious institution in the present climate of multifaceted and aggressive procedural reform in civil litigation.").

555. See Marcus, *supra* note 44, at 761 n.1; (citing STEPHEN B. BURBANK, *RULE 11 IN TRANSITION* 71 (1989) ("The answer lies not in throwing the baby out with the bathwater.")).

rulemaking.<sup>556</sup> Whatever may be the defects in the advisory committee process, few suggest abandoning the field to Congress.<sup>557</sup> The Judicial Council has already proven its rulemaking competence in areas specifically delegated by the legislature.<sup>558</sup> The nucleus of a standing advisory committee has been in place for many years.<sup>559</sup> Any necessary expansion of the current staff of experts to support an expanded rulemaking function should be adequately funded by the legislature.

#### D. Conclusion

California summary judgment law is in a state of confusion. This problem has been created by a legislative rulemaking process, which also blocks the way to a solution. Summary judgment procedure requires a complete overhaul from the ground up. Such a thorough reassessment of summary judgment requires honest, forthright debate, from a public-interest perspective, about the goals of California's judicial system and the role of summary judgment in that system. It requires informed decision making based on empirical research and careful deliberation involving the bench and bar.

Such reassessment is unlikely to come from the legislature. The legislative primacy rulemaking process does not promote clear thinking about summary judgment or about the future direction of California's civil justice system. Summary judgment procedure is currently trapped in political gridlock in the legislature.<sup>560</sup> The Judicial Council has retreated into its administrative role of court manager and the bar is factionalized between the trial and defense bars each pressing their own professional interests. Meanwhile, the public interest in a fair and efficient judicial system is caught in the cross fire.

California's judicial system, like that of the federal courts, is at a watershed somewhat akin to the historic shift in procedural paradigms that occurred during the 1930s and resulted in the epic reforms of the Federal Rules of Civil Procedure. As in the 1930s, the nation, and California,<sup>561</sup> are undergoing a period of soul-searching in which fundamental assump-

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556. See, e.g., Stempel, *supra* note 55, at 740 ("The Enabling Act, which was opened more to the public in 1988, should be opened further and amended in other ways."); Walker, *supra* note 82, at 489 ("I propose that the analogy of modern administrative law be employed to suggest adoption of a synoptic model of rulemaking for use by the Advisory Committee on Civil Rules."); Burbank, *supra* note 183, at 842 ("We need a moratorium on procedural law reform, whether by court rule or by statute, until such time as we know what we are doing.").

557. See *supra* note 181 and accompanying text.

558. See *supra* notes 67-69 and accompanying text.

559. See *supra* notes 70, 77 and accompanying text.

560. See *supra* note 8 and accompanying text.

561. See generally Scheiber, *supra* note 33, at 2057-67 (documenting the social and political content of change in the California courts).

tions—political, social, and economic—are being questioned. This rethinking of fundamentals includes the goals and further direction of the adjudicatory system.

This point in time offers California an historic opportunity to reexamine candidly what its citizens expect from their civil justice system. If the legislature is really interested in judicial reform and in streamlining the civil justice system, let it release the complete rulemaking power—and, with it, the code tradition of patchwork, piecemeal amendments—to the Judicial Council. The Judicial Council can serve the same function today that the Advisory Committee performed in the late 1930s of streamlining and simplifying the code of civil procedure through a process of careful and well-informed study that seeks “to arrive at a shared conception of the ‘common good’”<sup>562</sup> according to a coherent vision of a reformed judicial system.

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562. Stempel, *supra* note 55, at 751.

§ 437c. Grounds for and effect of summary judgment; procedure on motion

(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, and if the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 28-day period of notice shall be increased by two court days. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interroga-

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563. CAL. CIV. PROC. CODE § 437c (West Supp. 1996).

tories, depositions, and matters of which judicial notice shall or may be taken.

The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made at the hearing shall be deemed waived.

Sections 1005 and 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

Any incorporation by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections



based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived.

(e) If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. However, a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its deter-

mination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

(i) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard.

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

(k) In actions which arise out of an injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(l) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except the entry of summary judgement, a party may, within 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within

the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the initial period within which to file the petition shall be increased by two court days. The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(m)(1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion which has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not operate to bar any cause of action, affirmative defense, claims for damages, or issue of duty as to which summary adjudication was either not sought or denied.

(3) In the trial of an action, neither a party, nor a witness, nor the court shall comment upon the grant or denial of a motion for summary adjudication to a jury.

(n) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes an affirmative defense to that cause of action.

(o) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set

forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(p) Nothing in this section shall be construed to extend the period for trial provided by Section 1170.5.

(q) Subdivisions (a) and (b) shall not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

(r) For the purposes of this section, a change in law shall not include a later enacted statute without retroactive application.

